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ABSTRACT

This publication is the result of a series of meetings convened to explore options for broadcast regulation in the digital era. The report offers a crucial context for these issues and aims to contribute to a greater understanding of the legal, constitutional, economic, political, and other issues surrounding the debate. The first section deals with law and policy and contains the following reports and papers: "Toward a New Approach to Public Interest Regulation of Digital Broadcasting" (Angela Campbell); "Public Interest Obligations of Broadcasters in the Digital Era: Law and Policy" (Henry Geller); "Government-Created Scarcity: Thinking about Broadcast Regulation and the First Amendment" (Tracy Westen); "Self-Regulation and the Public Interest" (Robert Corn-Revere); "On Hooks and Ladders" (Monroe E. Price); and "'Red Lion' and the Constitutionality of Regulation: A Conversation among the Justices" (Monroe E. Price). The second section covers economics and implementation: "Achieving the Public Interest in an Era of Abundance" (Forrest P. Chisman); "Broadcasting Policy in the Digital Age" (Andrew Graham); "A Structure and Efficiency Approach to Reforming Access and Content Policy" (Steven S. Wildman and D. Karen Frazer); "Implementation of 'Pay' Models and the Existing Public Trustee Model in the Digital Broadcast Era" (Henry Geller); and "Casting a Broader Net: The Obligations of 'Digital Broadcasters' in a Changing Media Environment" (Andrew L. Shapiro). The last section focuses on political broadcasting: "Enhancing Political Discourse: Proposals for Political Programming in the Digital Era" (Anthony Corrado); "The Public Interest and Digital Broadcasting: Options for Political Programming" (Anthony Corrado); and "A Proposal: Media Access for All Candidates and Ballot Measures" (Tracy Westen). A list of participants is appended. (DLS)

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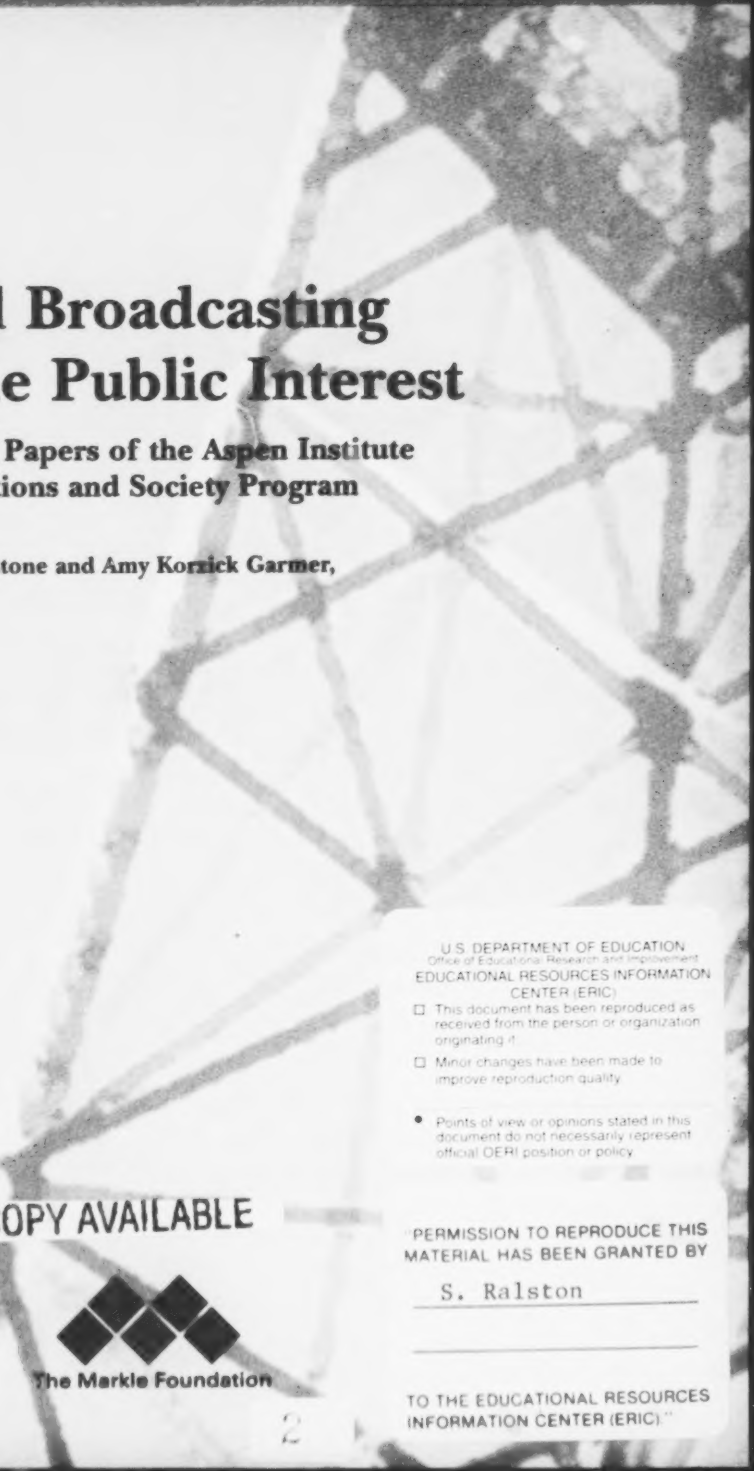

Digital Broadcasting and the Public Interest

Reports and Papers of the Aspen Institute Communications and Society Program

Charles M. Firestone and Amy Korzick Garmer,
Editors

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The Aspen Institute Communications and Society Program

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Editors

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Aspen
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Communications and Society Program
Charles M. Firestone
Executive Director
Washington, DC
1998

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Contents

Foreword
Charles M. Firestone and Amy Korzick Garmer . . . vii

PART I: LAW AND POLICY

Toward a New Approach to Public Interest Regulation of Digital Broadcasting
Angela Campbell . . . 3

Public Interest Obligations of Broadcasters in the Digital Era: Law and Policy
Henry Geller . . . 37

Government-Created Scarcity: Thinking About Broadcast Regulation and the First Amendment
Tracy Westen . . . 47

Self-Regulation and the Public Interest
Robert Corn-Revere . . . 63

On Hooks and Ladders
Monroe E. Price . . . 81

Red Lion and the Constitutionality of Regulation: A Conversation Among the Justices
Monroe E. Price . . . 89

PART II: ECONOMICS AND IMPLEMENTATION

Achieving the Public Interest in an Era of Abundance
Forrest P. Chisman 121

Broadcasting Policy in the Digital Age
Andrew Graham 151

A Structure and Efficiency Approach to Reforming Access and Content Policy
Steven S. Wildman and D. Karen Frazer 193

Implementation of "Pay" Models and the Existing Public Trustee Model in the Digital Broadcast Era
Henry Geller 227

Casting a Broader Net: The Obligations of "Digital Broadcasters" in a Changing Media Environment
Andrew L. Shapiro 247

PART III: POLITICAL BROADCASTING

Enhancing Political Discourse: Proposals for Political Programming in the Digital Era
Anthony Corrado 259

The Public Interest and Digital Broadcasting: Options for Political Programming
Anthony Corrado 293

A Proposal: Media Access for All Candidates and Ballot Measures
Tracy Westen 335

APPENDIX

Aspen Institute Working Group on Digital Broadcasting and the Public Interest: Lists of Participants at the January, March, and June Meetings 355

About the Authors 363

About the Communications and Society Program 369

Foreword

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A digital revolution is coming to television. By converting from analog to digital transmission of audio-visual signals, television broadcasters ("telecasters") are transforming the living room; digital television can deliver high-definition pictures and CD-quality audio to create a true home theater. Telecasters will soon be able to "multiplex," that is, transmit several digital channels over the same portion of the electromagnetic spectrum that they currently use for a single analog channel, potentially creating a kind of free wireless cable television system. They will also be able to target specific messages to different individual receivers, and send audio, video, and text simultaneously. Most importantly, digital broadcasters may eventually enable interactive communication with the audience over the air waves.

Quite simply, the move to digital broadcasting will likely change the very nature of the most powerful and important medium of mass communication in the world. Television, of course, is not just a medium of entertainment, or of news, or of casual interest. Over 98 percent of Americans have televisions in their homes—more than have indoor plumbing or telephones. In fact, one is hard-pressed to think of any common experience that binds Americans together more than television, with its pervasive reach into both the American home and its psyche.

FEDERAL REGULATION OF BROADCASTING

While the United States is a nation of receivers, it has only a limited number of telecasters. This is due both to the physical properties of the electromagnetic spectrum and the legal limits of the U.S. television licensing scheme. Physically, two broadcasters cannot transmit on the same frequency at the same time in the same location. Legally, Congress made an early decision to license only one broadcasting entity for each frequency per location; and it authorized its quasi-legislative agency, the Federal Communications Commission (FCC), to assign a limited number of frequencies for television broadcasting purposes.

Broadcasting in the "Public Interest"

Since the Radio Act of 1927, and its successor Communications Act of 1934, U.S. broadcasters have been subject to federal licensing and regulation according to the touchstone of "the public interest, convenience, and necessity." While this congressional standard may sound simple and direct, its vagueness and authority have generated volumes of federal regulations, court cases, scholarly commentary, political speeches, and citizen action. At one time the Supreme Court found the phrase to be a "supple instrument" for dynamic regulation of the air waves. More recently, however, some scholars have suggested that the phrase is unconstitutionally vague, which would preclude governmental regulation of this medium of speech under the First Amendment. More recent Court decisions have held that the "public interest" standard can not be used as a basis to regulate newspapers, and it has also placed regulation of cable television under more exacting constitutional scrutiny standards.

While broadcasting has been imbued since its beginnings with obligations toward the "public interest," governmental conceptions of the meaning of that term have changed over time. In the 1920s, for example, the government took away licenses for disparaging and discriminatory broadcasts and for broadcasts that used the frequency to sell its owner's patent medicines. In the 1960s the FCC revoked a broadcast license for racist policies (although that was not the stated reason). Twenty years later a chairman of the FCC defined the public interest standard in purely marketplace terms, i.e., the public interest was whatever interested the public. The debate over the public interest standard and what it incorporates, in other words, has been an active and divisive one for over seventy years.

Along the way—mostly at the height of the 1961–1973 regulatory era—the United States government has promulgated regulations or guidelines that have required or encouraged broadcasters to program in the public interest in a variety of ways. Broadcasters have been required to meet the needs and interests of their local communities, program news and public affairs programs, air educational programs for children, employ minorities, devote time to controversial issues of public importance (and provide the audience with opportunities to hear responsible advocates on contrasting sides of those issues), give equal opportunities (equal time) for the "use" of the station to all legally qualified candidates for a given office, and even retain unique entertainment formats in a given market. All of these manifestations of the "public interest" were controversial in their times. Since the 1980s many of them have been repealed. But the controversy over what should constitute the public interest in broadcasting continues to this day.

Indeed, the whole basis for regulating broadcasting has been subject to considerable and continuing political and scholarly debate. Although the Supreme Court unanimously affirmed the FCC's regulatory authority in 1969, comments and footnotes from Supreme Court justices, legal scholars, and others since that time have questioned that authority in light of the many other media outlets that reach the home.

The Migration to Digital Television

Despite this controversy, however, when Congress allocated new spectrum space in 1996 for broadcasters to migrate from analog to digital transmissions, it clearly provided that the "public interest, convenience, and necessity" standard would migrate with them. Although the public interest for digital broadcasting could be quite different from what it is in an analog world, Congress left the task of determining the details of that regulatory standard with the FCC.

Subsequent to passage of the 1996 Act, the President created a special Advisory Committee on the Public Interest Obligations of Digital Broadcasters to advise the administration on how the traditional public interest standard should manifest itself in this new broadcasting environment. The President's Advisory Committee, headed by political scientist Norman Ornstein and CBS television network president Leslie Moonves, is comprised of twenty-three individuals who represent the variety and diversity of America's public; its own report is being released near to the time of release of this volume.

The Political Environment

The appointment of the President's Advisory Committee, it should be noted, was made in the course of an ongoing debate over campaign finance reform. The two issues (campaign finance reform and digital television) are connected by the fact that political advertising on television has become the single most expensive cost of political campaigns. Some proponents of campaign finance reform thus see the digital television debate as a possible opportunity to reduce those costs.

Currently, broadcasters who sell time to candidates must do so at their "lowest unit rate" for commercial advertising time. While this provision grants some relief to the costs of a campaign, it is ineffective in reducing total campaign costs for at least two reasons. First, many candidates want their ads presented at specific times, which requires the purchase of "non-preemptible time," the most expensive inventory a broadcaster offers and a category that is rarely purchased by commercial advertisers. Second, candidates engaged in do-or-die contests will still purchase as much time as they can, which does nothing to alleviate the pressures to raise as much money as possible.

One thought on this issue is that if time can be made available for political discourse at little or no cost, members of the public will receive needed information to exercise their duties as voters and citizens. On the other hand, broadcasters do not want to give up their valuable inventory without truly changing the campaign financing system. Furthermore, even the provision of free time on television will not stop candidates from the race for dollars that has characterized our political system in recent elections.

Many observers who care about the nation's communications system do not want to see the entire debate over the public interest standard relegated to one of campaign finance reform. There are, they point out, many other needs of the American public with respect to broadcasting. Other observers make credible arguments that the broad public interest standard is, in any event, itself an anachronism.

A New Debate

The allocation of digital frequencies to television broadcasters has raised anew these concerns and debates. First, because the properties of digital broadcasting are significantly different from those of analog, there are legitimate questions about how the existing obligations will apply to the new transmission mode. For example, if a digital broadcaster multiplexes several channels on its frequency, should the obligation to air children's programming apply to each channel? Should the willingness to broadcast in high-definition television, which is certainly costly, relieve the digital broadcaster from other costly public interest obligations?

But there is another, perhaps more compelling reason for taking a fresh look at the issue of public interest broadcasting. Whereas most potential users now have to bid in the government's spectrum auctions for the right to use a portion of electromagnetic spectrum, current broadcasters have been given the new frequencies outright—no contest, no auction, no spectrum fee. They have also been allowed to keep their current frequencies so that they can broadcast in both analog and digital modes until most of the U.S. public has had a chance to purchase digital reception equipment. At that point, scheduled to happen by the year 2006, the broadcasters are to give back their analog frequencies, which are worth billions of dollars. Many observers believe this date will be delayed, however, if a great majority of the public has not purchased digital equipment, or if the broadcasters decide to try to forestall the return for other reasons.

Why such favored treatment? Broadcasters would point out that they are having to invest significant amounts of capital to provide the American public this new service. Having to pay for spectrum, too, would make this new service prohibitively expensive, or require additional revenue sources such as receiver subscriptions. Citizen activists, on the other hand, would suggest that it is the public interest obligation that gives broadcasters their free pass in the first place. If that is the case, what specifically is that obligation in the new era of digital television?

THE ASPEN INSTITUTE PROJECT ON DIGITAL TELEVISION

While the President's Advisory Committee was deliberating its task, the Aspen Institute Communications and Society Program, funded by The John and Mary R. Markle Foundation, undertook to aid the Advisory Committee, the FCC, Congress, and the American public by commissioning scholarly papers on related topics; convening three groups of diverse experts in roundtable format to consider specific underlying questions; and issuing this volume as a resource for those entering into the public debate over how the public interest should apply to digital television.

This volume, then, is intended to: (1) inform the question of whether and on what basis the government can legitimately regulate television broadcasters in the first place; (2) describe new and old models, frameworks, and vehicles for public interest regulation; (3) address specific questions relating to the use of telecasting for political discourse; (4) consider whether and to what extent the discussion should be broadened to other electronic media; and (5) add other insights that are germane to the ongoing debate over public interest obligations for digital broadcasting. Three points require further introductory and cautionary notes.

First, we have tried here to provide a legal, conceptual, and philosophical basis for the political debate, but have stayed away from the give and take of the real politics that will ultimately decide the question. That is, the objective of this project is to examine the underlying bases and rationales for regulation, and from that inquiry, to suggest various models and options that might be used as vehicles for the political bodies—the Advisory Committee, the FCC, the Congress, and the American people (and perhaps even those of other countries)—to fashion their regulatory or non-regulatory schemes.

Second, this volume does not address in depth the question of public broadcasting or public telecommunications. The idea of broadcasting in the public interest is inherent, certainly, in the discussions that follow. (The spectrum fee model, for example, stipulates that the money transferred from commercial to public broadcasters would go toward such programming.) But what that means—how the "public interest" in public broadcasting or public telecommunications is defined, funded, and enforced—remains a significant issue, a matter that was not the center of this inquiry and is therefore left to further explorations in other forums.

Third, while each of the Aspen Institute conferences on the public interest obligations of digital broadcasting included a broad cross-section of leaders and experts in the particular subject area in issue, the individual reports of those meetings convey the sense of the meeting as seen from the rapporteurs' particular vantage points. Generally, a diversity of models and options emerged. Nevertheless, it should be understood that these reports and the background papers in this volume do not necessarily reflect the views of the participants listed in the appendix, nor those of their employers.

The volume is divided into three sections: Section I addresses the legal and constitutional issues underpinning the regulation of broadcasting, section II discusses questions of economics and implementation, and section III examines political broadcasting.

Part I: Law and Policy

The six papers that constitute section I set the parameters of the legal bases for regulation of broadcasting. First is Georgetown University law professor Angela Campbell's report, "Toward a New Approach to Public Interest Regulation of Digital Broadcasting," which summarizes and analyzes the constitutional theories and rationales for regulation, and from that base, sets forth several proposed models for public interest obligations of digital television.

These models are perhaps the most interesting aspect of this entire exercise, as they form an "Aspen matrix" of potential vehicles of regulation which (along with self-regulation) were considered by the President's Advisory Committee early in its deliberations. Campbell describes these models, setting forth the pros and cons in each case:

- **Public trusteeship**. To continue or improve upon the current public trustee model—i.e., simply to apply the current obligations, perhaps modified in light of the physical properties of digital broadcasting, to broadcasters in their new electronic homes.
- **Spectrum fee**. To impose a spectrum fee of some kind in return for relieving digital telecasters of their public interest obligations, and then to earmark that money for public telecommunications purposes.
- **Pay plus access**. To require a combination of a spectrum fee, but to impose in addition a requirement of some access, at least by political candidates under certain circumstances.
- **Pay or play**. To quantify the value of the broadcasters' use of the spectrum and allow broadcasters the choice of paying that fee or reducing their payments by the value of certain public interest programming on their stations; or conversely, to quantify the value of public interest obligations and allow broadcasters to pay for them in alternative ways.

After discussion by the President's Advisory Committee of a preliminary draft of this report, we have added a fifth model to the matrix:

- **Self-regulation**. To satisfy basic obligations to the public by freeing the broadcasters from pure government regulation and substituting instead a system of self-regulation along the lines of the former Code of the National Association of Broadcasters.

In the second chapter of section I, former FCC General Counsel Henry Geller explains the conventional rationale of the public trusteeship scheme of regulation that stems from the Radio Act of 1927 and the Communications Act of 1934. Geller is critical of the "scarcity" rationale that undergirds current regulation, the rationale that "many more people want to broadcast than there are available frequencies or channels," and that the government's decision to grant some exclusive use of these scarce and valuable frequencies to the exclusion of others warrants its imposition of trusteeship obligations on those so favored. This concept was affirmed in *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367 (1969), a decision that has never been overturned despite many attacks in the Supreme Court.

Tracy Westen, president of both the Center for Governmental Studies and The Democracy Network, analyzes and re-explains the *Red Lion* decision in somewhat different terms. Broadcasting, he suggests, is an "interference-based" medium. In town hall meetings or legislative debates, time is allocated among various speakers. In broadcasting, however, the government allows only one licensee to "talk" at a time on any one frequency. Therefore, Westen suggests, the "scarcity" in broadcasting is not physical scarcity, economic scarcity, or supply/demand scarcity, but rather, "legally created scarcity"—Congress giving almost total control over the spectrum to its licensees. Quoting from the Supreme Court decision in *Red Lion,* Westen concludes that this rationale for regulation, i.e., for requiring licensees to share the frequency with others, withstands constitutional scrutiny even in an era where there are many more outlets of mass communication than were extant at the time of the Act.

In contrast, arguing for self-regulation as a means for achieving the public interest, Robert Corn-Revere, a First Amendment attorney and partner in the Washington, D.C. law firm of Hogan and Hartson, takes issue with the whole regulatory approach inherent in *Red Lion*. He suggests that the involvement of government in programming runs afoul of First Amendment jurisprudence, and should, in any event, be eschewed in this new era of digitization.

These arguments, rationales, justifications, and approaches are brilliantly, and somewhat whimsically, sorted out by Cardozo Professor of Law Monroe Price, whose two chapters complete section I. In "Hooks and Ladders," Price differentiates *hooks*, or legal rationales for regulation (e.g., scarcity, pervasiveness of the medium, and the history of regulation) from *ladders*, or societal justifications for imposing certain regulations (e.g., the power of the medium, children and public health, and the interest in free and fair elections). Price suggests that it is important to separate the hooks from the ladders, understand each, and determine whether hooks, ladders, or both are needed in American constitutional doctrine as it evolves.

Price's second chapter is a clever montage of statements, a "virtual seminar" among Supreme Court justices titled "*Red Lion* and the Constitutionality of Regulation: A Conversation Among the Justices." In the justices' own words, adapted from their opinions in a variety of germane cases, and supplemented through Price's hypothetical moderation by the chief justice, this chapter points out the complexity of the issues and diversity of opinions among the justices in this area.

With the exception of the Corn-Revere paper, the chapters included in section I formed the intellectual background for the first Aspen conference on the public interest obligations of digital broadcasting, which considered the constitutional bases for regulation as a way of addressing the panoply of vehicles justifying the application of a public interest standard to digital broadcasting.

Part II: Economics and Implementation

Growing out of the third Aspen conference on the public interest obligations of digital broadcasters, section II of this book addresses the economic and practical considerations in implementing the various models in the context of the rapidly changing world of electronic communications. Forrest Chisman, rapporteur of the third meeting of the Aspen Working Group, begins section II of this volume with an exploration of the many issues arising from the attempt to project new models of hooks and ladders in an environment consisting of rapidly changing and expanding new media. Chisman particularly attempts to flesh out the alternatives to content regulation: the free market approach, codes and self-regulation, and targeted subsidies. In each case, he examines the rationales, problems, special considerations, and impact of abundant media outlets.

Next, Oxford University economics professor Andrew Graham compares the American and British systems and addresses the need and incentives for the production of nonmarket-based public interest programming.

In the third chapter of section II, Northwestern University communications professor Steven Wildman and his colleague D. Karen Frazer provide a critical assessment of the models proposed in the Aspen matrix. Specifically, Wildman and Frazer consider the various models' structural appropriateness and their efficiency and effectiveness in addressing specific policy concerns. Their review leads them to propose an alternative regulatory model for consideration, which they label "pay plus compete":

- **Pay plus compete.** This model removes "play" as an option from the "pay or play" model, converting that model to spectrum fee. However, commercial broadcasters could earn back their public interest fees with various types of public interest programming and access commitments, but would have to compete with public broadcasters and other commercial broadcasters for the funds, which would be distributed at the discretion of a designated public authority.

Finally, attorneys Henry Geller and Andrew Shapiro offer legal analyses—the latter raising issues relating to the application of the public interest standard to digital media beyond telecasting.

Today, free over-the-air television is augmented by cable television, direct satellite, and wireless cable—all part of our "push" media of mass communication. But "pull" media are already emerging, a seemingly endless number of Web sites and networks on the Internet that are accessible by anyone, anytime, anywhere in the world. Broadcasting is rapidly moving to a video-on-demand medium for some, though potentially at the price of our traditionally free TV.

There are certainly many imponderables when entering the realm of technological futures. Many businesses are betting the farm on a continuation of network television models, while others are betting just as heavily on the new "pull" approach to mass communication. Pull and push will likely co-exist in the new media environment, but uncertainties in technology and economics do not make application of the new regulatory models any easier.

Part III: Political Broadcasting

Section III, which arises from the second meeting of the working group on digital broadcasting, discusses the nature of political discourse in the new digital telecosm. Clearly, television is a major proving ground for national and statewide political candidates. But are members of the viewing public getting the information they need to determine their votes or be adequately informed citizens in a robust democracy? If not, what should the role of governmental regulation of broadcasting be in addressing this issue?

The conference on this issue distinguished between the push and pull types of communicating described above. In the "pull" or library process, the public interest would appear to focus on citizen and candidate access to the library system, e.g., fostering access to the Internet where anyone can set up a Web site and make information available to the world.

Political candidates, on the other hand, like commercial advertisers, want to gain access to the public's attention system; they want to "push" their messages to those who do not necessarily seek them out or even care about the election. Since telecasters agglomerate mass audiences better than does any other medium, it is television audiences that the candidates covet.

So how important is it that candidates get access to broadcasting time? Which candidates? At what rates? Should the public interest obligation favor political advertising or longer discourse that citizens might not be interested in? What is the import of other media for these questions? And what does the move to digital telecasting say to this?

Colby College Professor of Political Science Anthony Corrado provides both the background paper and conference report in this final section of the book, on political discourse. These chapters are supplemented by Tracy Westen's proposal for candidate access and debate. Westen's is one in a long line of proposals for political broadcasting reform, many of which are recounted in the background paper. But recognizing and distinguishing the need for both a library "pull" system and a network "push" system in political broadcasting advances our thinking about the public interest standard for digital television.

CONCLUSIONS

The considerations, arguments, and approaches in this volume are intended as fodder for a broad debate on the public interest in digital telecasting and beyond. The project began as an effort to supplement and enhance the work of the President's Advisory

Committee on the Public Interest Obligations of Digital Broadcasting. But the project has since expanded to form a resource for the FCC, Congress, and most importantly, the American public in thinking through how our television system should work in a rapidly changing digital environment. It is an important, perhaps unique, opportunity to reconcile the many different forces at play here—the interests of incumbent broadcasters, new entrants, minority populations, political candidates, citizen and specific interest groups, competing media, and the average viewer.

More broadly, the questions at issue here may affect how we as a nation treat other media—for example, cable television, satellite services, and Internet content networks. They may affect how other countries will choose their paths as they move to digital telecasting. And most importantly, they may affect how we live as citizens in the continuing challenge of self-governance in the century ahead.

The purpose of this volume is not to state specific conclusions, however attractive that prospect may be. Rather, we try to frame and foster the debate, which should be one considered and deliberated among the public at large. Each section of this volume contributes depth and texture to the issue, beginning with the constitutional questions and development of new regulatory models, continuing with details of implementation of those models, and concluding with specific proposals for enhancing the citizen's access to significant political information and viewpoints.

Sorting out the components of public interest programming or specific requirements within those models is a task left to the political sphere, beginning with the President's Advisory Committee. Public decision-makers seek to devise regimes that place the needs and interests of the public as paramount. Their methods will no doubt change over time, because it is as yet unclear how the medium will develop, how its economics will change, and frankly, what further technological innovations are even possible. This volume contributes vehicles for considering those elements over time, constructs to help the public to understand the underlying values at stake and to engage the issues.

Acknowledgments

The many authors, rapporteurs, and conferees who participated in this project are listed in the appendix, and we thank all of these people for their time, insights, and efforts in considering and explicating the questions underlying the application of the public interest to digital broadcasting.

We want to acknowledge and thank Lloyd Morrisett and Edith Bjornson, the former president and vice president of The Markle Foundation, and Zoë Baird and Catherine Clark, current president and program manager of the foundation, for their support, encouragement, and design of the project.

E. A. Macom copy-edited the manuscripts of the papers, and Virginia Regan supervised production of the book with the assistance of Elizabeth Golder.

We should also note with appreciation that President's Advisory Committee co-chair Norman Ornstein participated in each of the project sessions and brought the materials collected in this volume to bear on the deliberations of the Committee itself.

PART I:

LAW AND POLICY

Toward a New Approach to Public Interest Regulation of Digital Broadcasting

Angela Campbell
Director, Citizens Communications Center
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In January, 1998, the Aspen Institute's Communications and Society Program convened the first in a series of meetings to examine the public interest in the United States' communications system. With funding provided by the John and Mary R. Markle Foundation, the Program hosted the initial session of the Aspen Institute Working Group on Digital Broadcasting and the Public Interest on January 25–27, 1998, at the Institute's Wye River Conference Center. The conference brought together twenty-three legal scholars, lawyers, economists, and policy advocates, representing a variety of experiences and perspectives, to consider two issues: (1) the theoretical and legal bases for the imposition of public interest obligations on those using the electromagnetic spectrum for broadcasting purposes, and (2) other public interest implications of the move to digital broadcasting. It is the hope of the Working Group that the ideas generated at this and subsequent meetings will add to the ongoing public dialogue on broadcasting and the public interest, and will prove useful to the ongoing debate over the public interest responsibilities that should accompany broadcasters' receipt of new digital television licenses.

This report summarizes the proceedings of the January, 1998, conference, and is divided into five sections. Section one, "The Current Status of DTV," summarizes the current status of digital television broadcasting (DTV). Section two, "*Red Lion* Revisited," addresses the constitutional underpinnings of the current public trustee scheme for broadcasting, focusing on whether the scarcity rationale established in the *Red Lion* case (*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 [1969]) remains viable today. Participants considered whether the advent of

DTV provides an opportunity to develop different justifications for broadcast regulation, including what those justifications might be and whether any reason at all exists for imposing public interest requirement on DTV. Section three, "Alternative Approaches to Public Interest Regulation," describes and critiques two alternatives to the public trustee model: a spectrum fee proposal and a "pay or play" proposal. Section four, "Factors to Consider in Developing Approaches for the Public Interest Obligations of Digital Broadcasters," discusses relevant factors to be used in weighing the merits of the various approaches. The final section of this report summarizes the four main models proposed and discusses the advantages and disadvantages of each.

THE CURRENT STATUS OF DTV

Like analog television, DTV uses 6 MHz of the electromagnetic spectrum. Unlike analog, which can send only one program at a time, DTV can offer a variety of programs and services simultaneously. For example, a digital broadcaster can broadcast a single program with a very-high-resolution picture (high-definition television [HDTV]) or multiple channels of programming at standard resolution (SDTV). (The broadcast of multiple channels is called "multiplexing.") In addition, DTV also permits the transmission of a variety of data services.

The Telecommunications Act of 1996 resolved many outstanding questions about DTV. For example, the Act requires that should the Federal Communications Commission (FCC) issues licenses (which it has done), the licenses must go to existing analog broadcasters. The Act also specifies that DTV licenses, like analog licenses, are subject to public interest obligations. Moreover, the Act specifies that while broadcasters may, for now, continue to operate on their existing portion of the spectrum, they will at some point have to give it back. (It should be noted that many Working Group participants predicted that broadcasters will never actually be required to give back their analog channels.) Finally, if broadcasters use the new spectrum for "ancillary and supplementary services" for which they receive payment, they must pay a fee equivalent to that which they would have paid had the spectrum been auctioned.

In April 1997, the FCC issued a Report and Order outlining very minimal standards for DTV.[1] The FCC report declined to require broadcasters to air HDTV; nor did it require a progressive signal as proposed by the computer industry. The report did require each individual broadcaster—whatever else it decided to do with its spectrum—to provide at least one free channel with programming comparable to that offered today so that the public would be no worse off. The FCC report stated the FCC's intent to hold further proceedings on broadcasters' public interest obligations.

Questions left unresolved by the Telecommunications Act and the FCC report include: (1) whether DTV signals will be protected by "must-carry" rules, i.e., whether cable systems will be required to retransmit the DTV signals of digital television broadcasters in the manner currently required for analog channels, and (2) how fees will be assessed for ancillary and supplementary services such a subscription channels (those channels for which broadcasters charge consumers to receive programming). While the industry plans an aggressive build-out, with the top four stations in the top ten markets scheduled to begin digital broadcasts in November 1998, much uncertainty remains in the market.

RED LION REVISITED: UNDERLYING THEORIES OF PUBLIC INTEREST REGULATION

The explosion of new media for communication made possible by advances in digital technology raises the question of whether the scarcity rationale, discussed below, continues to make sense as a basis for regulating broadcasting. In this environment, are there alternative legal bases for justifying government regulation of broadcasting?

There was significant, but by no means unanimous, support among the Working Group participants for using a public property/public forum rationale to justify continued governmental regulation. Under this rationale, because government owns the spectrum, it has the right to set the rules for discourse, impose obligations, and provide subsidies for speech that may be insufficiently provided for in the marketplace. Some participants argued that this rationale provides a superior basis for regulating both analog broadcasting and DTV, and justifies the continuing differential treatment of broadcasting vis-à-vis other categories of media.

The Traditional Basis for Regulating Broadcasting: Scarcity

The traditional rationale for regulating broadcasting dates back to the 1920s. To reduce the amount of interference and chaos in the use of the radio spectrum, the U.S. government began to license the spectrum. The government's role vis-à-vis the spectrum has three components: it allocates spectrum among various types of uses, it assigns height and power restrictions to broadcasting towers and equipment, and it determines who gets to broadcast by awarding licenses. The government allocated more spectrum to broadcasting than to other uses to foster the local outlets Congress wanted (§307 of the Communications Act of 1934) and to contribute to the creation of an informed electorate (§315 of the Communications Act).

Because more people wanted to broadcast than there were frequencies available, the government had to make some choices. As Justice Byron White noted in the Supreme Court's decision in *Red Lion*, the government could have licensed many speakers to speak at different times, but instead decided to put one speaker on and keep everybody else off. Under this approach, the licensee has no property interest in the frequency and is required to act as a fiduciary for those who are kept off. In other words, the licensee has certain obligations to serve the public interest and has to demonstrate to the FCC that it has done so. Because of the dynamic nature of broadcasting, the Communications Act generally left it to the FCC to determine the nature of those public interest obligations. The constitutionality of this scheme was upheld by the Supreme Court in the 1943 *NBC* case (*National Broadcasting Co. v. United States*, 319 U.S. 190 [1943]) as well as in *Red Lion*.

Although many people argue that *Red Lion* is no longer valid because broadcasting outlets are no longer scarce, Henry Geller, communications fellow at The Markle Foundation and former FCC general counsel, asserts that this view is incorrect. The scarcity critical to the constitutional issue is that many more people want to broadcast than there are available frequencies because of a government licensing scheme putting one person on the frequency and enjoining all others. *That* scarcity still exists today. When *Red Lion*, which involved a personal attack carried on a radio station, was decided in 1969, there were approximately seven thousand radio stations on the air. Today there are some eleven thousand radio stations on the air. To Geller, it makes no sense to say that the scheme is constitutional with seven thousand stations but not with eleven thousand stations.[2]

Five years after *Red Lion*, the Supreme Court found unconstitutional a similar personal attack regulation applied to a newspaper in *Miami Herald Publishing Co. v. Tornillo* (418 U.S. 241 [1974]). In its decision in *Tornillo*, the Supreme Court did not even mention *Red Lion*, much less distinguish its decision in *Tornillo* from its earlier *Red Lion* decision. The government sought to extend the *Red Lion* analysis to cable television, but the Supreme Court rejected this approach in the first *Turner* case (*Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 [1994]). Similarly, the Court rejected applying *Red Lion* to the Internet in *Reno* (*Reno v. ACLU*, 117 S.Ct. 2329 [1997]). Although it is hard to know what to make of these recent decisions, it is clear that some justices, including Justice Antonin Scalia, Chief Justice William Rehnquist, and Justice Clarence Thomas, do not like the broadcast regulatory scheme.

Some Working Group participants thought that the Supreme Court was unlikely to extend *Red Lion* to DTV. However, Andrew J. Schwartzman, president of Media Access Project, said that the 1996 Telecommunications Act, as well as the budget bill, suggested that abandonment of *Red Lion* would be unwise. Steve Shiffrin, professor at Cornell University Law School, added that if the Court overturned *Red Lion*, the government could take the frequencies and put on its own programming, just as government decides what the General Printing Office (GPO) will print or public universities will teach.

Critique of the Scarcity Rationale

Several participants took issue with the traditional understanding that government intervention was needed to prevent chaos. Robert Corn-Revere, a First Amendment attorney and partner at the Washington, D.C., law firm of Hogan & Hartson, noted that a system of private ownership had begun to develop earlier this century that could have resolved the problem of chaos. This development was cut short, however, by the passage of the Radio Act of 1927. Thus, it is not at all clear that regulation was or is required to prevent chaos. He observed that the recent use of spectrum auctions provides tacit recognition that a system of private property rights could provide an alternative to regulation.

Second, Corn-Revere asserted that even if it made sense to discuss scarcity in the past, that is no longer the case today. At the time *Red Lion* was decided, the only way to provide audio or video programming was to get a license from the FCC. Today, with Internet radio, digital audio, forty channels of audio on direct broadcast satellite (DBS), video cassette players, and hundreds of cable networks, there are multiple ways to provide audio and video programming.

With so many alternatives available, he argued, it no longer makes sense to justify regulation in terms of scarcity. Rather than looking for other justifications, Corn-Revere would advocate the elimination of broadcast content regulation. Because he views such regulation as an anomaly and full First Amendment rights as the norm, he is troubled by the assumption that broadcasters should continue to have "second-class" rights under the First Amendment.

Robert Crandall, senior fellow at the Brookings Institution, agreed that scarcity makes no sense as a rationale for broadcast regulation—even though spectrum may be even more "scarce" today than in the past because of the increasing number of uses. If scarcity were a basis for regulation, Crandall argued, everything could be regulated. In Crandall's view, regulation might be justified by market power over ideas. But increases in the value of spectrum do not necessarily mean that there is an increase in market power over ideas.

Crandall criticized the government for allocating the spectrum in a way that created more scarcity than necessary and gave incumbent broadcasters tremendous power to hinder competition. Nolan Bowie, fellow at Harvard Law School's Berkman Center for Internet and Society, agreed that the scarcity is government created, noting that in the 6 MHz needed for a single television station, the FCC could have instead licensed thirty FM or six hundred AM radio stations. This led to a discussion of whether DTV technology would permit sharing in a way that might avoid scarcity. In the United Kingdom, for example, a white paper has proposed that different programmers be licensed to provide program feeds on a single DTV transmission. The incumbent licensee would own the transmitter and be compensated by the other programmers. However, in the United States, under the full 6 MHz standard adopted by the FCC, it would not be possible to divide the 6 MHz into separate channels and license them separately.

Because of the questions raised, both on and off the Court, about *Red Lion's* continuing viability in the new digital era, it makes sense to consider whether the transition from analog to digital television presents an opportunity for reconsidering the scarcity rationale for regulating broadcasting and providing a constitutionally firm basis for public interest regulation. Two alternative theories were discussed at the first meeting of the Aspen Institute Working Group on Digital Broadcasting and the Public Interest.

An Alternative Theory: The Need for Rules for an Interference-Based Medium

Tracy Westen, president of the Center for Governmental Studies, offered an alternative rationale for regulating the spectrum. He does not believe that the constitutionality of broadcasting regulation hinges on scarcity. Rather, Westen argued, the basis for regulating broadcasting is the need for government to develop rules for using the frequencies in order to avoid interference, just as a city council makes rules for taking comments at a public hearing or the Supreme Court sets the terms for an oral argument. Whether such rules are constitutional turns on whether they are reasonable. In moving to manage and to regulate the spectrum, the government could have set up the rules so that more people could speak, but it chose not to for policy reasons, thereby creating scarcity.

For example, the government could have reserved one hour per day per broadcaster in the periods before elections for political candidates without raising constitutional problems. From here, it is a reasonable next step to ask broadcasters to share their transmitters with political candidates for a limited period of time. In exchange, the broadcasters get to use the spectrum for free and they do not have to share it with any one else.

An Alternative Theory: Public Property Rationale

John Duffy, assistant professor at the Cardozo Law School in New York, argued that it is important to have a theory of the First Amendment that applies to all speech, rather than to treat broadcasting as an "exception." He urged that the best way to do this is to rehabilitate the "public property rationale." Duffy disagreed with the claim that government is needed to create rules to make speech possible in an otherwise chaotic environment. But it would be appropriate for government to create rules for use of its property. He compared broadcast licensing to a small city contracting out control over access to a public park where the contractor would have no right to speak to the exclusion of others.

Shiffrin agreed that the public property rationale provides a superior analysis to the scarcity rationale. In his view, government can license spectrum usage because it has a property interest in the spectrum. Whether or not the common law would have worked out a way to treat spectrum as private property, the fact is that the government asserted its property interest in choosing to allocate the spectrum using a licensing scheme, and under this scheme no one has a superior right. The government could have sold off the spectrum, but it did not, and nothing in the First Amendment requires it to sell the spectrum.

Because the government decided to license broadcasters as trustees, Shiffrin does not believe that licensees have the right to keep the frequencies without meeting the conditions of the trust. But this does not mean that government can do whatever it wants with the spectrum either. He claims that broadcasters have First Amendment rights analogous to the academic freedom rights of professors in public universities who, while subject to certain limitations and conditions as employees of government-funded institutions, enjoy broad intellectual freedom and speech rights under the First Amendment. The public forum doctrine further provides a basis for the public to have some right of access. If the public has a right of access to parks, ought it have access to a far more important medium of communication? This does not mean that the First Amendment mandates access, but it can be used as a sword as well as a shield. While acknowledging that the Supreme Court has held otherwise, Shiffrin thinks the Supreme Court was wrong, and that in any case, a distinction can be drawn between what the First Amendment requires and what it permits.

Tracy Westen commented that the public property theory makes an important contribution, but fails to explain why the spectrum is government property. He asked whether the City of Los Angeles could, consistent with the First Amendment, buy the *Los Angeles Times* and turn it into a public forum. He thinks not. But he would distinguish this hypothetical case from the case of the radio spectrum. Because spectrum is interference based, the government had the option to privatize it or to make it public. While acknowledging that the government could have sold off the frequencies, the question remained as to what it was selling. Is it the right to exclusive use of the spectrum or is it a more limited right?

Should Similar Public Interest Obligations Apply to All Forms of Media?

With multiple ways of obtaining audio and video content, Andrew Shapiro, fellow at Harvard Law School's Berkman Center and director of the Aspen Institute Internet Policy Project, observed that it was becoming harder for audiences to differentiate between audio and video providers who are using the spectrum (such as traditional television and radio broadcasters) and those who are not (such as Internet broadcasters). Shapiro expects that in the next five to ten years there will be a hybrid television-computer network. Where some media are subject to public interest obligations and others are not, he voiced his concern about "regulatory arbitrage." But Julius Genachowski, general counsel of HSNi Broadcasting, pointed out that every other medium is subject to some form of public interest regulation. For example, cable systems have public access requirements and direct broadcast satellites (DBS) have a set-aside requirement for noncommercial educational programming. In his view, the relevant question is not whether to impose public interest regulation, but whether public interest obligations should be the same for competing media or be adapted to "fit" the particular medium.

Others cautioned that, with the exception of broadcasting, the constitutionality of public interest obligations had not yet been ruled upon by the Supreme Court. While the Supreme Court upheld the constitutionality of must-carry regulations for cable, it essentially viewed them as antitrust regulations. And while a panel of the D.C. Circuit Court found the DBS set-aside constitutional, members of the court were deeply divided on this issue.[1] Resolution of such questions are important for the future. Although the Internet is not now subject to a public interest regulatory scheme, Corn-Revere wondered if that exception would continue if policymakers and courts agreed with the assumption that all media should be regulated. He expressed his concern that the traditional protections of the First Amendment would be lost and that we would end up with a fundamentally different understanding of the First Amendment.

Framework for Assessing the Constitutionality of DTV Public Interest Requirements

In assessing the constitutionality of regulations affecting speech, the Supreme Court uses different levels of scrutiny. A standard of *strict scrutiny* is employed where the government seeks to suppress or regulate speech because of its content. Strict scrutiny requires the government to show that the regulation serves a compelling governmental interest and does so using the least intrusive means. As a practical matter, application of strict scrutiny quite often results in a finding that the regulation is unconstitutional. *Intermediate scrutiny* is employed where government regulation, while incidentally affecting speech, is content neutral. This involves a balancing test, called the *O'Brien* test,[4] that requires that the governmental interest be substantial and the regulation be narrowly tailored to serve that interest (though not necessarily the least restrictive means). The third level of scrutiny is called *rational basis*. Where there are competing speech interests, the Court determines whether the government has struck a reasonable balance, as for example, rules governing the conduct of a city hearing.

Courts have applied the least intrusive means and narrowly tailored tests quite flexibly. Three questions frequently arise in applying these tests. First, what alternative means of achieving the government objective are truly available? Second, which means are narrower than others? Third, which means actually work? These tests make sense when the government seeks to suppress speech or has some adverse impact on speech rights, but not when the government is subsidizing speech, e.g., universities, museums, the GPO, the Voice of America, and other overseas broadcasting.

Monroe Price, professor at the Cardozo Law School in New York, noted that there was a quiet debate within the Supreme Court about the value of the existing categories and approaches to First Amendment analysis of the media. Some justices, particularly Justice Stephen Breyer, have seemed open to what they call a more "contextual" analysis in which historic doctrines, like scarcity, would be less relevant to determining whether and how government can regulate. Furthermore, as the media issues become more ones of industrial competition and structure, the Court will have to decide how much to defer to Congress's factual characterizations of media effects and desirable media organization and role.

Should the Court Apply the *Red Lion* Standard to DTV ?

Since the effect of *Tornillo* was to confine the differential regulatory treatment to broadcasting, it is important to address whether DTV should be treated in the same manner as broadcasting. Andrew Schwartzman argued for treating DTV differently from the Internet. He contrasted the Internet, where there is a true public square and an abundance of speakers, with DTV, where the government has selected a limited number of speakers. No content regulation is needed for the Internet, whereas regulation is needed for DTV to create a marketplace of ideas. He sees a difference between government regulation designed to create a marketplace of ideas, which is an appropriate role for government, and government regulation designed to abridge speech, which is not. With DTV, regulation should be concerned with setting up a system to maximize discourse.

Brookings' Robert Crandall pointed out that requirements imposed on broadcasters could become irrelevant in the future, when all forms of programming are distributed by wire and over-the-air broadcasting is subsumed by the Internet. Crandall thought that regulation of DTV would be unnecessary because DTV will offer hundreds of addressable channels and serve minority interests, effectively serving the public interest without resorting to government regulation.

David Johnson, former director of the Aspen Institute Internet Policy Project, agreed that one might distinguish the Internet from broadcasting on the grounds of abundance, but observed that interference exists on the Internet as well as in broadcasting. He said that he could imagine that the arguments of the past regarding interference and government property used to justify broadcast regulation could be replayed in connection with the Internet. If broadcast regulation was not premised on history, he said, he feared it could be expanded to cover everything else.

Shiffrin suggested that the property rights theory permitted DTV to be distinguished from other media. The government does not own the *Los Angeles Times*, but it does own the spectrum used by broadcasters. The government has communications objectives for the use of its property and it is appropriate to license the use of this property in furtherance of those objectives.

Westen argued that any rationale that exists for regulating analog television applies equally to DTV. The key difference between analog and digital television, he said, is the ability to multiplex. While multiplexing provides the ability to treat different channels in different ways, it does not eliminate scarcity since there is still only one speaker: the broadcaster holding the license.

What Are the Rationales for Regulating DTV?

Under either strict or intermediate scrutiny, it is essential to identify the government's rationale for regulating. Thus, it is important to identify the government's rationale in regulating broadcasting.

Participants first identified a variety of public interest goals and needs. These included: (1) service directed to local communities; (2) democratic deliberation by providing electoral information as well as generally promoting a marketplace of ideas with viewpoint diversity; (3) the education and protection of children; (4) public health and safety; (5) national defense; (6) lessening First Amendment tensions; (7) continued availability of free television, including both advertiser-supported and commercial-free programming; (8) arts and culture; and (9) a shared national experience.

Mark Lloyd, executive director of the Civil Rights Telecommunications Project, argued that the goal of regulating DTV should be to promote democratic deliberation. There is some tension, he said, between what is efficient in the marketplace and what is good for a democracy. The prevailing paradigm has been that of the marketplace, but it is equally appropriate for government to act to foster community and democratic values. While agreeing that the market and the community are not necessarily opposed, he urged that the market should serve community values and be checked if it does not.

Some participants suggested that providing a shared national experience by creating a "public square" was a useful goal. There was concern that young people today had less common knowledge than in the past and that society is becoming increasingly segmented. Shapiro suggested that the problem is not too *few* channels but too many, and the real scarcity is one of attention, causing people to complain about "data smog" and "information overload." The large number of channels makes it difficult to engage in a common discourse. But even though technologies are converging, differentiation will continue to exist. As Zoë Baird, president and CEO of The John and Mary R. Markle Foundation, observed, "not everyone can be on AOL's top page."

Why Not Simply Rely on the Marketplace?

Some participants questioned whether the solution for these problems should come from government or the private sector. Shiffrin expressed concern that the marketplace treated citizens merely as consumers, encouraged a hedonistic society, and was hostile to anti-materialistic messages. Furthermore, advertisers prefer to avoid political advertising and controversial programming, and have failed to serve audiences such as children and the elderly that are not as attractive to advertisers. In addition, the kinds of programming that attract large audience, e.g., sensational crime, are not necessarily good for society.

Crandall responded that Shiffrin had outlined the case against the old regime, but that it was a different world today. Now there are so many channels available so cheaply that people should be able to express their desires through the marketplace. Additional channels make niche programming more economically feasible. Moreover, Crandall questioned whether people could or should be made to watch television that is "good" for them because, given the abundance of channels, people can always turn to something else.

This discussion posed an apparent dilemma: In response to scarcity, the number of voices has been expanded. Now, with so many voices and their resulting fragmentation, people are concerned that society lacks a public square or common experience. Competition actually can make matters worse by eliminating common viewing experiences and squeezing subsidies for beneficial types of programming. While bookstores have an incentive to diversify content to bring in more consumers, television is always under pressure to go for the mass audience. Should the government act to remedy this problem or should resolution of this tension be left to the market?

If it is left to the market, it is uncertain whether a public square will develop. Traditional broadcasting may no longer be economically feasible in the future. Already, the cable sports broadcaster ESPN competes with the broadcast networks for the rights to football, and HBO produces movies. It is unclear what consumers will want from DTV, e.g., whether they will want a single HDTV signal or multiple channels. It is likely that stations will broadcast some events, such as sports and dramas, in the HDTV format, while at other times provide pay channels in competition with cable as well as data transmission services. To get an idea of what the marketplace might do, Nicholas Johnson, former FCC commissioner and professor at the University of Iowa College of Law, suggested looking at the Internet and asking what is good about it and what needs improvement. Would the problems with broadcasting be solved if it became more like the Internet, or would a different set of problems arise?

Some responded that a multiplicity of channels did not ensure a diversity of voices. They thought that government should take an active role in (1) promoting democratic deliberation, (2) subsidizing the creation of a "public square," and (3) promoting the availability of educational programming for children, because of market failure in these three areas. Others preferred to rely on the market, suggesting that television should just entertain and education be left to books. They believed that whether the market leads to homogenization or to fragmentation, no regulation is needed.

ALTERNATIVE APPROACHES TO PUBLIC INTEREST REGULATION

The discussion turned next to two basic models of regulation that might be employed. The spectrum fee proposal, advocated by Henry Geller, would relieve broadcasters of their public interest responsibilities in exchange for a spectrum fee that would be used to support public broadcasting. The other proposal, called "pay or play," would give broadcasters the choice of either meeting their public trustee responsibilities or paying to get out of them.

The Spectrum Fee Proposal

Geller argued that commercial broadcasters should be relieved of public interest programming responsibilities and instead pay public broadcasters to serve these non-market public interest goals with high-quality programming. Because they do not have to maximize audiences to sell advertising, public broadcasters can seek to provide high-quality educational programming in the public interest. However, Geller agreed that there were problems with the present system of public broadcasting that would need to be reformed.

Specifically, Geller suggested setting up a trust fund that would allow public broadcasting to become independent of Congressional funding. Funding could come from a percentage of the revenues of cable companies as well as broadcasters. For example, 3 percent of broadcasting gross revenues would yield roughly $1 billion per year. After five years, the trust would be endowed and could run on the interest. Geller thought it would be desirable to make public broadcasting independent of Congress and also get rid of "enhanced underwriting." But some questioned whether public broadcasting would achieve its intended goals if it were freed of political control.

Geller would retain the existing ownership rules as well as improve cable leased access and public access in order to promote diversity of voices. Similarly, broadcasters would still be subject to section 315's requirements to provide equal opportunities for political candidates (at least for paid appearances), closed captioning, and sponsorship identification, as well as its payola prohibitions and indecency restrictions. But he would relieve broadcasters from their obligation to provide reasonable access for federal candidates now required by section 312(a)(7) of the Communications Act and would not reinstate the Fairness Doctrine.

The "Pay or Play" Proposal

Under a "pay or play" approach, DTV licensees would be given a choice of providing certain kinds of public service or paying others, such as public broadcasters, to offer services in the public interest. The provision of public service or payment might take any number of forms, including devoting a certain number of megabits, channels, or hours to public service or contributing space for educational data transmission.

Schwartzman suggested there were virtues to a "mixed model," that is, *permitting* the ones that want to opt out do so but not *requiring* them to. Some broadcasters may believe it is good for the community or good for business to do community-oriented programming. Given flexibility, broadcasters might also be inclined to enter into local joint ventures, such as a local version of C-SPAN. But others were skeptical, fearing that the only reason broadcasters would offer children's educational programming instead of paying would be because it would be cheaper to do so.

Some objected that the mixed model would continue the problems with the existing public trustee system, require aggressive enforcement, and create incentives to buy out. Proponents of this model responded that the public trustee system could work, but generally has not been effectively implemented. They thought that effective enforcement could be based on self-reporting and complaints, and would not be unduly burdensome.

Charles Firestone, director of the Aspen Institute's Communications and Society Program, presented a variation on the "pay or play" approach called the "spectrum check-off" model. First, the spectrum is valued by auctioning the lowest valued station and allowing the incumbent to match the highest bid. That amount would be converted into a ten-year lease with annual payments. Broadcasters would have to make the annual payment, which could be offset by providing programming desired by the government, such as public service announcements or children's educational programming. This approach would reduce tensions with the First Amendment because it would be clear that it was the government speaking. While similar to the "pay or play" approach, the main difference is that as a matter of largess, the government accepts payment in programming for programming that it wants.

There was some discussion of how far the government could go in dictating the content of programming that would be counted. Some suggested that the government would in effect treat the licensee as a contractor and would not have to count programming that was not what it intended. To the extent that the government did not treat the licensee as a contractor, the same quality concerns might arise that arise under the current trustee scheme. Moreover, the programming would not be noncommercial as it would be if payments were made to support public broadcasting.

Reactions to the Proposals

Participants raised a number of different questions and concerns about these proposals to allow broadcasters to buy out of some or all of their public interest obligations. Several participants expressed their concerns about relegating public interest programming solely to noncommercial channels. Some speech, such as that concerned with the political process and public safety, is so important that all members of the public ought to hear it. For this reason, we allow people to solicit door to door even though some people would prefer not to be disturbed by solicitors. Society benefits from hearing from diverse speakers and from breaking down "ghettoization." To address these concerns, it was suggested that commercial broadcasters "ventilate" their programming with, for example, access for political candidates or leased time. Shapiro suggested requiring linkages between the commercial and public programming in an attempt to get a share of the public's most valuable commodity—its attention.

Daniel Brenner, vice president for law and regulatory policy at the National Cable Television Association, suggested examining whether other schemes involving payment have been successful. For example, local jurisdictions may assess a cable franchise fee of up to 5 percent. What has this money been used for? What have been the intended and unintended effects? Are people satisfied with how the money has been used? He noted that people seemed to like things that were not subsidized by government, such as C-SPAN.

Norman Ornstein, resident scholar at the American Enterprise Institute, suggested that one option would be to create an entity in which broadcasters could participate, similar to the Ad Council. That entity would allocate the funds in the public interest. It could decide to support access for public broadcasting, operate a time bank for political candidates, support local initiatives or run programming. However, some participants were uncomfortable with the idea of broadcasters playing a role in the decision making.

Some suggested that any funds collected from broadcasters might be better spent on things other than programming. For example, funds might be used to teach media literacy or to subsidize access to DTV for low-income people. Some participants were concerned that with the shift to DTV, large segments of the public would not be able to afford the receiving equipment; other participants suggested that this problem could be avoided by letting broadcasters keep their analog channels.

Some participants also objected to collecting the payment "in kind," that is, requiring certain types of programming in exchange for use of the spectrum. In general, the government does not collect resources in kind but in dollars through taxes. Taxes may be a superior means of addressing perceived deficiencies, since they make subsidies apparent. One of the problem with the current system is that we have no idea what we are getting and what the cost is. Duffy suggested that we should be talking about subsidy instead of regulation and be looking for new approaches to subsidies.

FACTORS TO CONSIDER IN DEVELOPING APPROACHES FOR THE PUBLIC INTEREST OBLIGATIONS OF DIGITAL BROADCASTERS

Working Group participants explored the factors to be considered in developing and evaluating alternative approaches for DTV public interest requirements. These included the public interest goals to be attained, mechanisms for achieving these goals, how much it will cost and who will pay, and how public interest requirements are enforced.

Goals

Four goals were identified as primary: political broadcasting, children's educational programming, public health and safety, and localism. With respect to political broadcasting, Tracy Westen further identified three important public interest elements: First, long programs as well as free access for messages should be provided. Second, state and local candidates should have reasonable paid access just as federal candidates do. Third, ballot issues should have reasonable paid access. Participants also recognized public interest obligations to serve persons with disabilities, but did not go into detail on specific mechanisms for achieving this goal. Participants generally agreed that whatever scheme is adopted, it should strive to reduce tensions with the First Amendment.

Mechanisms

Three basic mechanisms were identified. The public trustee (broadcast) model, the entry and access (common carrier) model, and the private ownership (print) model. Several hybrids or combinations were also possible. It was noted that simple access requirements would not achieve certain goals, such as children's television, because someone needs to produce high-quality programs. In general, a problem with access schemes is the lack of resources to produce programming. It was suggested that this problem might be addressed by creating a federal council such as the Foundation for Community Service. In addition, commercial broadcasters might be required or encouraged to help with production and promotional activities.

How Much Will it Cost and Who Will Pay?

Depending on the proposal, the burden of paying may fall on the broadcaster, the speaker, or the government. The government might pay either through spectrum fees or general tax revenues. Brenner expressed concern about the cost of the obligation, comparing the discussion to discussing the "flavor of tea on the Titanic." He predicted that future debate would not be over what public interest obligations should have been imposed, but who was responsible for killing DTV—the FCC (for requiring too rapid a build-out), the cable industry (because DTV may not be viewable on cable even if carried), or the broadcasters (because they did not know what to do with it). But Schwartzman pointed out that the cost of complying with existing public interest obligations is a fraction of 1 percent of the cost of converting to digital.

Enforcement

Enforcement responsibilities could be allocated to the FCC, the courts, the market, or the public. Whoever does the enforcement, however, it is important to create incentives for compliance. Some participants stressed the importance of including citizens in the enforcement process. But it was noted that currently several factors work against effective citizen participation. For example, the lengthening of license terms to eight years and the elimination of formal "ascertainment," in which stations were required to meet with representatives of their community and ascertain their program needs, has cut the connection between broadcasters and the local community.

PROPOSED MODELS FOR PUBLIC INTEREST OBLIGATIONS OF DIGITAL TELEVISION

The following set of options for meeting the public interest in digital broadcasting is distilled from the preceding discussion, as well as from the background readings and papers prepared for the Aspen Institute conference. The options range from simply adapting the current scheme of public trustee regulation for digital television to eliminating public interest programming obligations altogether in exchange for payments to subsidize public telecommunications. The other two models fall somewhere in between. The "Pay Plus Access" model would require broadcasters to both pay and provide certain limited forms of access to third parties. The "Pay or Play" model would give broadcasters the option of meeting public interest programming obligations or paying to support public broadcasting. The models are intended to be used to achieve a wide variety of policy goals, although some models may be more effective than others depending on the desired objectives. For example, requiring broadcasters to give access to third parties may be an effective means to ensure that political candidates can get their message out, but is not a good way to ensure that children have access to high-quality educational programming. (See Figure 1.)

It should be noted that two additional schemes, voluntary self-regulation and total deregulation, offer alternatives to the mechanisms discussed below. A recent survey of broadcasters, funded by the National Association of Broadcasters (NAB),[6] illustrates the extent to which broadcasters already engage in voluntary public service activity. While these alternatives were raised during the Working Group's conference sessions, they were not developed in any detail and are thus not included in the discussion which follows.

FIGURE 1: THE ASPEN MATRIX

This matrix illustrates four commonly mentioned public interest goals and how each would be addressed by the four different models.

Goals	PUBLIC TRUSTEE	SPECTRUM FEE	PAY & ACCESS	PAY OR PLAY
Localism and community	Broadcast licensees are obligated to provide programming responsive to issues of concern to local community. (Difficult to enforce.)	Fees could subsidize local public broadcasters or other local programming entities.	Fees could subsidize local public broadcasters or other local programming entities.	Some stations would provide programming that addresses local issues; others would buy out of this obligation, thus supporting public broadcasting.
Informed electorate	§ 315 requires equal opportunities and lowest unit rates for all candidates; 312(a)(7) requires reasonable access for federal candidates.	Fees could fund a time bank to buy time for candidates; public broadcasters might schedule more programming that presents candidates' views. (Unclear whether such programming would be watched by large audiences.)	Would require all stations to give access to political candidates.	Some stations would provide programming about and access to political candidates; others would buy out of this obligation, perhaps contributing money to a fund that candidates could use to buy time.

Diversity of viewpoints	Fairness Doctrine (now repealed) required contrasting views on controversial issues of public importance. Today diversity is addressed (to limited degree) by ownership limits.	Unclear how this proposal would advance diversity of voices unless part of fund was earmarked to support new entrants or programmers.	Diversity of voices would be enhanced if leased access were required.	Unclear how this proposal would advance diversity of voices unless part of fund was earmarked to support new entrants or programmers. If some broadcasters opt to play rather than pay, there is likely to be a greater diversity of views than with the straight spectrum approach.
Children's educational programming	Licensees obligated to provide programming that serves educational needs of children (3 hrs. / week guideline).	Children's programming would be left to public broadcasters, with incentive to produce high-quality programming; public broadcasters would have increased funding to support these efforts.	Children's programming would be left to public broadcasters, with incentive to produce high-quality programming; public broadcasters would have increased funding to support these efforts.	Some commercial stations would air children's programs; some would pay others to do it or support public broadcasting.

Proposal 1: Continue or Improve Upon the Current "Public Trustee" Model

This option would maintain the current public trustee obligations of broadcasters and simply apply them to digital broadcasting. In short, broadcasters would continue to identify issues of concern to their communities and provide programming responsive to those issues, serve the educational and informational needs of children, provide equal opportunities and lowest unit rates to all candidates for public office, and afford reasonable access to federal candidates.

It is not obvious how these public interest requirements will translate to the digital environment, in part because it is still unclear how broadcasters plan to utilize their new frequencies. For example, if broadcasters opt to provide a single program channel in HDTV, it would be easy to apply the same requirements, e.g., to use a three-hour-per-week guideline for children's educational programming, or to determine what "equal opportunities" means by applying existing case-law precedents. However, if a broadcaster chooses to provide multiple program streams via multiplexing for some or all of the time, applying the requirements becomes much more difficult. For example, if the broadcaster has quadrupled the total number of program hours, should the children's educational guideline also be quadrupled? Should one of the multiplexed channels be devoted to public service programming? Does the broadcaster need to offer candidates the lowest unit rate on all channels or only on one of the channels?

Some have argued that if the public trustee model is retained, at the very least certain improvements can and should be made by providing clearer direction to broadcasters and objective ways to measure compliance. For example, just as the FCC has adopted a processing guideline for children's educational programming, it could adopt a quantitative guideline for local and informational programming (e.g., *x* percent between 6 a.m. and midnight and in prime time). Broadcasters might also be required to devote a reasonable amount of time (e.g., twenty minutes, with three to five minutes during prime time) to political candidates in the period prior to an election.

Participants suggested several other ways that the public trustee scheme might be improved upon. These include: (1) reinstituting some form of meaningful ascertainment of the community's problems, needs, and interests; (2) repealing "postcard renewal" and requiring licensees to file sufficient information at license renewal to permit effective FCC and public review of whether a licensee has met its public trustee responsibilities; (3) restoring the Fairness Doctrine; and (4) extending equal opportunities to ballot issues.

Arguments in favor of this approach. Generally, it is easier to maintain the status quo than to effect major change. Moreover, this option seems most consistent with Congress' intent. The Telecommunications Act specifically provides that nothing in the section concerning digital television should

> be construed as relieving a television broadcasting station from its obligation to serve the public interest, convenience, and necessity. In the Commission's review of any application for renewal of a television station that provides ancillary or supplementary services, the television licensee shall establish that all of its program services on the existing or advanced television spectrum are in the public interest." (47 USC § 336[d])

Improvements in how public trustee responsibilities are defined and enforced could benefit the public with respect to existing analog broadcasting as well. These benefits could be especially significant if the transition to digital television takes a long time.

Arguments against this approach. This option would preserve the public trustee model, which has been widely criticized as ineffective. Geller has argued that even though the public trustee scheme is constitutional, it necessarily involves content regulation, and thus creates First Amendment tensions. Also, the First Amendment precludes governmental focus on a most important aspect of public service—high-quality fare. Moreover, it has failed to achieve its intended goals. "Public interest" is a somewhat nebulous concept and it may be difficult to adopt effective, objective, and constitutional standards for what is required of broadcasters to serve it.[8] Commercial broadcasters facing fierce and increasing competition have understandably been guided more by the "bottom line" than by serving the public interest. Consequently, retaining the public interest standard continues this state of affairs.

Proposal 2: The "Spectrum Fee" Model

Under this option, broadcasters would be relieved of their public interest programming obligations and, in exchange, would pay a fee that would be used to support public telecommunications and other sources of worthwhile speech not adequately provided by commercial broadcasters. This proposal raises three sets of questions. First, how much should broadcasters have to pay? Second, what will be done with the money collected? Third, what public interest responsibilities should broadcasters be relieved of in exchange for paying the fee?

One proposal is to require broadcasters to pay a percentage of their gross revenues for a certain number of years (perhaps 3 percent for 5 years). This money would be placed into an endowment. Another proposal would be to assess a transfer tax every time a station is sold. This might be seen as more acceptable to broadcasters because it would be considered a cost of doing business and could be allocated by the parties in the transfer negotiations.

As to how the money should be spent, several options are possible. First, it could be used to fund public broadcasting, thus relieving public broadcasting of the continuing need to seek Congressional reauthorization. (However, some participants cautioned that public broadcasting would need to be substantially reformed because it has become too commercially oriented.) Another idea was to use the part of the money to fund other public interest purposes such as a time bank for political candidates, local programming, and children's educational programming. Still others suggested that a new entity be created to make funding decisions. Models for such an entity included the National Endowment for the Arts and the Ad Council.

Under this approach broadcasters would be relieved from public trustee programming obligations such as serving the educational needs of children, addressing local community issues, and affording time to comply with the personal attack and political advertising rules. However, they would continue to be subject to the same regulations as cable television (such as ownership limits and prohibitions against payola) and to equal opportunities provisions (perhaps applied only to paid time).

Arguments in favor of this approach. This approach addresses well-known critiques of the public trustee model. It would relieve broadcasters of public trustee responsibilities, markedly reduce First Amendment tensions, and greatly enhance the resources of public broadcasters, who have strong incentives to provide high-quality public interest programming. Public broadcasters exist for the purpose of providing such programming, especially in the education field. Because they do not rely on advertiser support, they do not need to maximize audience size. However, with significantly increased funding, they would be able to better publicize their offerings. This option also makes the public interest subsidies explicit, and presumably, puts the public in a better position to judge whether the subsidies serve its needs. It ends the asymmetrical regulation of broadcasting and cable television.

Arguments against this approach. This scheme could not be implemented without Congressional approval and for this reason, even if the Advisory Committee recommended it, the FCC could not adopt it. Nonetheless, its proponents felt it was a worthwhile proposal for consideration by Congress.

Even if Congressional authorization were forthcoming, some participants expressed concern about putting certain types of programming, e.g., programming about political candidates, on channels that viewers will need to seek out ("pull"). Candidates wish to reach a broader audience than just viewers of public broadcasting. To create an informed electorate, it may be important that audiences get exposure to candidates and issues whether they want to or not ("push"). Moreover, the spectrum fee might discourage broadcasters who desire to serve the public interest from doing so, thus potentially reducing the quantity and diversity of public interest programming. Finally, there are difficult, unresolved issues regarding whether the fees would be used solely to support public broadcasting, whether public broadcasting would need to be changed, or whether a different way of distributing the funds would need to be developed.

Proposal 3: The "Pay Plus Access" Model

This option would relieve broadcasters of public interest program obligations except for certain types of access programming, and in return, assess a fee as in the spectrum fee model discussed above. It addresses one of the criticisms of the spectrum fee model, that is, that candidates' speech ought not to be relegated to channels that people need to seek out in order to see or hear. To make candidate speech widely and easily available, commercial broadcasters would be required to "ventilate" their program schedule by providing some specified amount of time to political candidates in the period prior to elections. A certain amount of time might also be available for leasing by third parties to promote a diversity of viewpoints. In addition, commercial broadcasters could be required to promote and provide linkages to the subsidized programming on the public television stations, so that more people would be aware of these sources of information and education.

Arguments in favor of this approach. This approach seems to have the same advantages of the spectrum fee approach, while ensuring candidates' access to broad audiences and making it easier for the public to locate information they may seek that is not available on commercial stations. It promotes the ideal of a public square, that is, to have some basic level of common knowledge in society.

Arguments against this approach. This approach has the same problems as the spectrum fee proposal. In addition, it would be more complicated to administer because the FCC would have to enforce the access and linkage requirements. Leased access requirements have not been successful in producing diverse program sources on cable systems, so it is questionable whether leased access would be effective in this context.

Proposal 4: The "Pay or Play" Model

Under this model, public interest obligations are quantified, and broadcasters are given the choice of either meeting these public interest obligations through their programming or paying. Several variations of this model are possible. Two different approaches are discussed below.

One approach is called the "spectrum check-off model." This approach provides a specific dollar value to the trade off that underlies the public trustee scheme, i.e., exclusive use of a valuable frequency protected against interference by government, in exchange for serving the needs and interest of the community. It then gives the broadcaster the choice to pay for the spectrum or to continue the public trustee bargain. Payments would be used to support public broadcasting or the direct purchase by the government of programs and services deemed to serve the public interest.[9]

Under the "spectrum check-off" approach, broadcasters would be charged for the use of the spectrum on an annual basis. The value of the spectrum might be determined by auctioning off the lowest-rated station in a market and then permitting the incumbent broadcaster the option to lease the frequency at a price equivalent to the highest bid. Broadcasters could pay this fee to the government or they could "check off" up to the full value by airing programs or spots from program categories that the government determines are in the public interest, such as children's educational programs, free political spots, or public service announcements. In the digital television environment, they might also check off the value of certain other nonprogram uses of the spectrum, such as providing high-speed data connections to schools and libraries. The government could use the money received from the fees to support public broadcasting or to purchase time on commercial stations for government-produced or supported public interest programming.

Another approach is based on the Clean Air Act Amendments of 1990. That Act established a scheme for reducing sulfur dioxide emissions by allocating firms a fixed number of "emission allowances" that they could use, bank for future use, buy from other companies, or sell to other companies. This scheme appears to be successful in meeting environmental goals at less cost than traditional regulatory methods. It has been suggested that if a broadcaster's public interest obligations were quantified, the broadcaster could choose to produce and air the programming required or to pay another station in the market, perhaps the public broadcasting station, to produce such programming at less cost to the station. The Children's Television Act in fact has adopted this approach in permitting broadcast licensees to meet part of their obligation to serve the educational and information needs of children by demonstrating "special efforts . . . to produce or support [children's educational] programming broadcast by another station in the licensee's marketplace" (47 USC § 303b[b][2]). However, broadcasters have not yet taken advantage of the opportunity to support children's educational programming on other stations in lieu of providing their own programming.

One distinction between the two approaches is how the public interest obligations are quantified. Under the spectrum check-off approach, the public interest obligations are conceived of as "payment" for use of the spectrum. Broadcasters could be required to pay the full fair market value or somewhat less. Under the Clean Air Act approach, the public interest obligations are set at whatever type and amount of programming is considered beneficial for society. The obligation could be valued in terms of hours of programming (as it is for children's educational television), numbers of megabits, numbers or percentages of channels, or some other measure that might take into account viewership.

Another difference between the two approaches concerns the role of the government. In the spectrum check-off approach, the government plays an active role in determining the kinds of programming that will count toward meeting a licensee's obligations and in determining how to spend the funds it receives from broadcasters opting to pay instead of play. The government's role is somewhat more limited in the Clean Air Act model. There, the government would quantify the public interest obligation, but would not itself receive any money. Rather, any payments (in cash, programming, or other forms of support) would be negotiated by the broadcasters within a market. Presumably, the government would need to conduct some sort of review to ensure the public interest obligations were in fact fulfilled.

Arguments in favor of this approach. According to its proponents, the "pay or play" option combines the best of both the public trustee and spectrum fee models. It lets broadcasters who believe it is good for business or their community to serve the public interest through programming continue to do so, thus increasing the quantity, diversity, and availability of public interest programming. Broadcasters who provide such programming only because they feel compelled to do so by the FCC would instead provide needed support to public broadcasting or other programmers who want to provide this type of programming. This option could lead to significant funding for public broadcasting and provide a useful first step for testing whether the public is better served by abandoning the public interest scheme and replacing it with a payment.

The spectrum check-off approach offers ease of administration, once valuation is achieved. It may reduce First Amendment tensions because it quantifies the public interest obligation and would make clear that when broadcasters elect to pay for the spectrum through programming, they are speaking on behalf of the government. Thus, the government could be quite specific about the type of programming it wants, so long as it does not violate the First Amendment, and more directly target programming to serve the public interest.

In addition, the Clean Air Act model is thought to be attractive because it might encourage creative joint ventures between commercial broadcasters or commercial and noncommercial broadcasters within a local market.

Arguments against this approach. To its critics, this model combines the worst of the public trustee and spectrum fee models. If it is cheaper for broadcasters to provide public interest programming than to pay, they will do so and the programming will likely be of very poor quality. But if they need not pay much to get out of their public trustee responsibilities, little funding will be achieved.

For those who believe that the current public trustee system has failed and would prefer that broadcasters pay, this plan provides only a partial solution. It continues the well-known problems with the public trustee scheme, including the fact that enforcement is difficult. But without aggressive enforcement, licensees will have little incentive to "buy out" of their obligations.

The spectrum check-off approach also presents serious obstacles to implementation. It may be difficult to determine the value of the spectrum. Determining the value by auctioning the least-viewed station in a market, as described above, could likely not be done without a change in the law. Another problem is to determine the value of time on the stations. One option is to use the lowest unit rates similar to those used for political candidates. However, lowest unit rates have been criticized for generating excessive litigation.

Another problem may arise when stations elect to pay for the spectrum through programming. It is not clear how far the government can or should go consistent with the First Amendment in determining the quality and content of such programming. To the extent that licensees are given substantial discretion in determining, for example, whether a program is educational, this model may continue some of the same problems that currently exist with the public trustee model.

Congressional authorization would likely be needed to utilize the "Clean Air Act" model outside of the children's television area. Moreover, this model was criticized by some parties in the FCC proceeding implementing the Children's Television Act for creating the wrong incentives, making children's educational programming seem like something to be avoided, and being administratively difficult to monitor and enforce.

Endnotes

1. *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, Fifth Report and Order, 12 FCC Rcd 12809 (1997).

2. Similarly, there were about nine hundred television stations in 1969 compared to seventeen hundred today. Geller believes that at some point in the future it may be possible for millions of people to broadcast, thus eliminating allocation/authorization scarcity. But that is not the case today. The above discussion of scarcity addresses the constitutional basis of the public trustee scheme—not the wisdom of the scheme in the face of exploding numbers of electronic media outlets.

3. Shiffrin disagreed. In his view, the government could buy the *LA Times*, but it could not prevent the *LA Times* from starting another newspaper.

4. *Time Warner Entertainment Co., v. FCC*, 93 F.3d 957 (D.C. Cir. 1996)(per curiam), *reh'g en banc denied*, 105 F.3d 723 (D.C. Cir. 1997).

5. *United States v. O'Brien*, 391 U.S. 37 (1968).

6. "Bringing Community Service Home: A National Report on the Broadcast Industry's Community Service," National Association of Broadcasters, April 1998.

7. The specifics of one such proposal are contained in the Common Cause Petition for Rulemaking filed with the FCC in October, 1993. The Aspen Institute's Working Group addressed specific proposals relating to free and reduced-rate access by political candidates at a second meeting in late March, 1998.

8 See Henry Geller, "Public Interest Obligations of Broadcasters in the Digital Era: Law and Policy," in this volume; and Henry Geller, "1995-2005: Regulatory Reform for Principal Electronic Media," Position Paper, The Annenberg Washington Program of Northwestern University, Nov. 1994.

9 The details of this proposal are spelled out in Charles M. Firestone, "The Spectrum Check-Off Approach," paper prepared for the Aspen Institute Working Group on Digital Broadcasting in the Public Interest, January, 1998, and in Todd Bonder, "A 'Better' Marketplace Approach to Broadcast Regulation," 36 *Federal Communications Law Journal* (1984).

Public Interest Obligations of Broadcasters in the Digital Era: Law and Policy

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This article discusses the public interest obligations of broadcasters in the digital era. It first sets out the requirements of the Communications Act of 1934, as amended, then it discusses the constitutionality of those requirements under current First Amendment jurisprudence. After a critique of the efficacy of the present regulatory regime, the article presents possible revisions of the scheme for the digital era. Finally, it advances an alternative approach urged by the author.

THE COMMUNICATIONS ACT OF 1934

The Communications Act of 1934, as amended, requires the public fiduciary approach, specifies several requirements, and affords great discretion to deal with the dynamic field of broadcasting.[1] Congress considered the issue again in the Telecommunications Act of 1996, and while it drastically reformed the common carrier portion of Title II, it determined to continue the public interest (fiduciary) standard for broadcasting in the digital era. After specifying the process for advanced TV services, Title II, section 336, of the 1996 Act states that "[n]othing in the foregoing section shall be construed as relieving a television broadcasting station from its obligation to serve the public interest . . . ; [i]n its review of any application for renewal of a [television] broadcast license, the television licensee shall establish that all of its program services on the existing or advanced television spectrum are in the public interest."

The 1996 Act does not specify any new explicit public service requirements. It thus continues the present requirements: that the broadcaster serve as a local outlet;[2] that it afford equal opportunities to candidates for public office at any level and reasonable access to federal candidates;[3] and that it be required to show at renewal that it has served the educational and informational needs of children, including broadcasting programming specifically designed to do so.[4]

Finally, while the above explicit requirements of the Act must be met, the Federal Communications Commission (FCC) has been delegated great discretion in formulating and revising its public interest policies over time in this dynamic field.[5] The FCC has several times shifted its programming policies, and clearly has the power to do so again to meet changed circumstances in the digital era.[6] Any such change must eschew direct censorship of programming (sec. 326) and must be shown to be reasonably related to the public interest standard.

THE CONSTITUTIONALITY OF THE PUBLIC TRUSTEE SCHEME

The public trustee scheme has consistently been held to be constitutional under current First Amendment jurisprudence, from the 1943 *NBC* case (*NBC v. U.S.*, 319 U.S. 190 [1943]) to the 1969 *Red Lion* case (*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 [1969]) to the present day.[7] The Supreme Court recently stated that although the scarcity rationale has been criticized since its inception, "we have declined to question its continuing validity as support for our broadcast jurisprudence, . . . and can see no reason to do so here."[8]

Recent Supreme Court cases have repeated the special place of broadcasting in First Amendment jurisprudence. See, e.g., the statement of Justice Breyer for the plurality in *Denver Area Educ. Consortium v. FCC*, 116 S.Ct. 2374, 2384 (1996), which cites *Red Lion* as "employing highly flexible standard in response to the scarcity problem unique to over-the-air broadcasting"); and *Reno v. ACLU*, 117 S.Ct. 2329, 2343 (1997), which states:

> Thus, some of our cases have recognized special justification for regulation of the broadcast media that are not applicable to other speakers. . . . In

> these cases, the Court relied on the history of extensive government regulation of the broadcast medium, see, e.g., *Red Lion*, 395 U.S. at 399–400. . .; [and] the scarcity of available frequencies at its inception, see., e.g., *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 637–638.

Broadcasters have stated that they accept the compact to serve the public interest in exchange for free use of the spectrum.[9] They are, of course, free to change that position and challenge again the constitutionality of the public trustee scheme. But it would be wrong and factually inaccurate to argue for reversal of *Red Lion* on the ground that there is now no scarcity. The scarcity relied upon in *Red Lion* is that many more people want to broadcast than there are available frequencies or channels.[10] That same scarcity indisputably exists today. *Red Lion* was a radio case, and in 1969 when it was decided, there were roughly 7,000 stations. It is ludicrous to argue that the public trustee scheme is constitutional at 7,000 but unconstitutional at 11,500 (the number of stations broadcasting today).[11]

The argument would have to be directed to overruling the *Red Lion* rationale (rather than distinguishing it on the basis of changed circumstances) and treating broadcasting under the traditional First Amendment jurisprudence. If so treated, broadcast provisions such as the 1990 Children's Television Act, which while viewpoint-neutral are clearly directed to content, would thus arguably come under strict scrutiny, with the government bearing the heavy burden of establishing that the regulation is narrowly tailored to meet a compelling state interest (i.e., is the least restrictive means of meeting that interest).[12] In light of alternatives such as strong governmental subsidy schemes for public broadcasting to deliver high-quality children's programming (discussed in Section V of this paper), this test would pose great difficulty for the government.

However, there is considerable confusion in this area. First, the categorical approach is being questioned by several members of the Court.[13] Second, the Court did apply the categorical approach to broadcasting in one case, *League of Women Voters v. FCC*, 468 U.S. 364, 380-81 (1984), but even though the regulation was clearly content-based, it used the content-neutral intermediate standard of *O'Brien*.[14] Under that approach, regulations like the CTA provision would clearly pass constitutional muster. But the *O'Brien* rationale of *League of Women Voters v. FCC* has never been repeated in the broadcast field, and instead the "highly flexible" approach of the *NBC* case (reasonably related to the public interest) appears to hold sway.[15]

The bottom line can be simply stated: Congress has declared that public trustee regulation shall continue, and the Supreme Court has indicated that it adheres to the constitutionality of such regulation. Unless and until there is a drastic change by either the Congress or the Court, the FCC must apply the public interest (trustee) standard.

FAILURE OF THE PUBLIC TRUSTEE MODEL

The implementation of the public trustee model has been a failure from the outset, and most significantly, continues to be a failure today.[16] With one exception-the CTA-broadcasting has been effectively deregulated. As to the CTA, its contribution to public service is modest, at best; may even erode over time; and in any event, cannot really address the essential goal—high-quality programming designed to truly educate and inform.

This latter point is borne out by the recent *New York Times* article, "Networks Comply, but Barely, on Children's Shows." The article states that "[t]he first batch of new shows to comply with the [FCC's children's television] rule is a mixed bag of reruns from PBS or cable, a few innovative shows that appear to have the new mandate at heart, and some entertainment shows with an overlay of educational material slapped on like shellac."[17] For example, the article says, "ABC has retooled '101 Dalmatians' to include sentimental lessons about friendship and responsibility," and NBC "continues to say that 'NBA Inside Stuff' is designed to teach 'life lessons,' not just promote basketball."

Cable has continued to grow, adding new programming channels, and drawing much closer to television broadcasting in its audience size. Direct Broadcast Satellite (DBS), with its many channels of digital programming, will grow, and so may other new entrants in multichannel video distribution. In this fiercely competitive environment, over-the-air television broadcasting's public service efforts will be under great pressure.

POSSIBLE REVISIONS OF THE PUBLIC TRUSTEE MODEL

If the public trustee scheme is retained, it should be revised in the high definition television (HDTV) scenario to specify clear quantitative guidelines in the public service categories; regulation in the multichannel scenario must await market clarification.

There are two polar scenarios for digital broadcast television: (1) mostly HDTV, with some limited spectrum used for ancillary services (e.g., data and pay-per-view), and (2) very substantial multichannel broadcast operation, with significant HDTV presentations (e.g., sports and prime-time shows). Obviously, there can be operations that meld (1) and (2) in various proportions. The broadcaster, being required only to present one channel of broadcasting programming, has great discretion as to its future digital operations. The decision will be made on the basis of market results, and as the trade journals have made clear, most broadcasters are quite uncertain at this time as to the shapes of their future operations.

It follows that adopting policies now for operations involving a substantial amount of multichannel broadcast presentations is premature. If the market leads to substantial multichannel broadcast operations, there could be revision of the public service requirement, for example, to focus on 3 Mbs. being devoted to public service, with no commercials allowed (and perhaps with a "play or pay" option whereby the commercial broadcast could have full and unfettered use of the 3 Mbs., but would pay an appropriate sum into a trust fund for public television). But this is purely speculative at this time.

On the other hand, it is sound policy to revise the present public interest scheme to make it more effective for the existing analog service and for any very largely HDTV scenario (which will closely resemble the present service). The public trustee scheme is very largely a joke today (see "The Failure of the Public Trustee Model, above). The argument put forth by broadcasters to continue the present "flexible" scheme is simply a way of ensuring that the implementation of the public service obligation will be a failure. Of the existing obligation to present local service, informational programming, and core educational programming for children, only the latter has a processing guideline. There should be objective, quantitative guidelines for local and informational programming (e.g., 15 percent in the hours from 6 a.m. to midnight and in prime time). There should also be a requirement to present "core" political time along the lines of the Common Cause petition filed in October, 1993, which urges a requirement that broadcasters, during a short, specified period before a general election, devote a reasonable amount of time (e.g., twenty minutes, with three to five minutes in prime time) during the broadcast day to appearances in which the candidates use the station as an "electronic soapbox."[18]

AN ALTERNATE APPROACH

Congress should abandon the public trustee scheme and in its place require the broadcaster to pay a modest percentage of its gross revenues to a trust fund for public broadcasting.

There is no revision of the public trustee scheme that makes the slightest sense for radio broadcasting. Nor is there any revision for television broadcasting that will be effective in obtaining the true goal—high-quality public service programs, adequately produced and marketed. It is therefore urged that Congress adopt an alternative scheme of a modest spectrum usage fee for the public fiduciary obligation.[19]

It has been suggested that the fees obtained from digital broadcasters' ancillary or subscription services (see section 336[e] of the Communications Act) be allotted by Congress to public broadcasting. Certainly this is a most worthy use of such fees. But it will not do to rely upon such fees to be sufficient to the objective. As stated, there is no way to forecast whether there will be any significant revenues from this source, even assuming that Congress would be willing to allow these revenues to be put to such use. (Significantly, similar funds from the auction of spectrum have been used for deficit reduction.) On the other hand, Congress might well be persuaded to allow the revenues from the suggested alternative scheme to go to public broadcasting, because the approach substitutes strong public service from public broadcasting for the weak public service now obtained from commercial broadcasting.

Endnotes

1 The basis of the Congressional scheme—that the broadcast licensee is a fiduciary, a "public trustee" obligated to render public service—is set out in my testimony before the Senate Rules Committee hearing on campaign finance reform, May 15, 1996, and will not be repeated here.

2 See section 307(b), requiring an allocation scheme of local outlets. The present regulatory regime therefore calls for community issue-oriented programming. See Deregulation of Radio, 84 FCC2d 968, 977-83 (1981); Revision of Programming and Commercialization Policies . . . for Commercial Television Stations, 98 FCC2d 1076, 1077, 1091-92 (1984).

3 See sections 315(a), 312(a)(7). The FCC's allocation scheme provides for a generous allotment to broadcasting, compared to other uses, specifically so that broadcasting can contribute to an informed electorate.

4 See Children's Television Act of 1990, 47 U.S.C. 303b(a)(2) (herein CTA).

5 See *NBC v. U.S.*, 319 U.S. 190, 217 (1943); *Pottsville Bctg. Co. v. FCC*, 309 U.S. 137 (1940).

6 For a discussion of this issue, see Henry Geller, "1995-2000: Regulatory Reform for Principal Electronic Media," a paper published by The Annenberg Washington Program of Northwestern University, November 1994.

7 Again, I refer the reader to my May 15, 1996 testimony before the Senate Rules Committee.

8 *Turner Broadcasting System, Inc. v. FCC*, 114 S.Ct. 2445, 2456-57 (1994).

9 As I wrote in the 1994 Annenberg paper:

> In the 103rd Congress, the administration sought funds to offset lost revenues from the General Agreement on Tariffs and Trade (GATT) reductions and proposed a $5 billion spectrum usage fee on broadcasters (beginning at 1 percent of gross revenues and rising to 5 percent). The NAB [National Association of Broadcasters] successfully opposed this efffort, and used the argument that this fee scheme would "change the landscape of communications policy" by eliminating broadcasters' commitment to serve the public interest in exchange for free use of this spectrum. "Broadcasters have always supported that compact, [NAB President] Fritts says. This proposal, however, puts it at risk, he says."

10 See my testimony before the Senate Rules Committee referenced above.

11 In his dissent in the denial of the suggestion for rehearing *en banc* in *Time Warner v. FCC*, 105 F.3d 723, 724-26 (1997), where the court affirmed the requirement of a 4-7% access set aside in DBS for noncommercial educational use (see 93 F.3d 957, 973-77 [D.C. Cir. 1996]), Judge Williams (joined by three other judges) ignores the above critical fact, and concludes that *Red Lion* is "... limited to cases where the number of channels is genuinely low" (at 726). The plain fact is that *Red Lion* is based squarely on the scarcity consideration that more people want to broadcast than there are available channels, and the government, rather than passing out licenses to many for a week or a month at a time, decided upon the fiduciary scheme. See *Turner Broadcasting System, Inc. v. FCC*, 114 S.Ct. 2456-57 (1994), also known as *Turner I*.

The Court's distinction between cable and broadcasting in *Turner I* is puzzling, since, while cable has many channels of programming, one entity is licensed by the government (usually a monopoly but sometimes a duopoly) and has editorial control over these many channels (hence the need for public and leased access). The short answer may be that in the circumstances of cable, access provisions, rather than direct content provisions like the 1990 CTA, are clearly called for, both as to policy and constitutionality.

12 *Turner Broadcasting Systems, Inc. v. FCC*, 114 S.Ct. at 2478 (O'Connor, J., dissenting).

13 Thus, in the *Denver Area* case, *supra*, Justice Breyer, joined by three other members of the Court, backed away from use of categories ("judicial formulae"), and spoke instead of government addressing "extraordinary problems"—"extremely important problems, without imposing, in light of relevant interests, an unnecessarily great restriction on speech." *Denver Area Educational Telecommunications Consortium, Inc. v. FCC* 116 S.Ct. at 2384-86 (1996). The five other members did apply the categorical approach, but reached different conclusions.

14 Content-neutral regulation is valid if it "furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

15 Thus, in *Turner I*, the lower court had used the *O'Brien* standard to consider the constitutionality of the must-carry provisions applied to cable. On appeal, the government argued that *Red Lion* should have been applied. The Supreme Court rejected this argument, holding that *Red Lion* is confined to the broadcast area. 114 S.Ct. at 2456-57. If *O'Brien* were applicable to broadcasting, the Court would have rejected the government argument simply by saying that the broadcast standard and the standard used below were the same (i.e., *O'Brien*).

16 A detailed discussion of this vital point is set out in my 1994 Annenberg paper and will not be repeated here.

17 L. Mifflin, "Networks Comply, but Just Barely, on Children's Shows," *New York Times*, December 11, 1997, C1.

18 This requirement was proposed not as a part of campaign reform but to implement the public interest in broadcasting by a further needed significant contribution to an informed electorate. There have been much more sweeping proposals put forth as part of campaign finance reform. These proposals have great merit, but since they

are tied in with campaign finance reform, they must await Congressional action. If enacted, they would not be inconsistent with the alternative proposed in section V of this paper; it would simply mean that the percentage of gross revenues taken from the broadcast industry would be adjusted to reflect the amount involved in any such campaign reform scheme.

19. For a fuller description of such a spectrum usage fee, see Angela Campbell's paper, "Toward a New Approach to Public Interest Regulation of Digital Broadcasting," and Henry Geller, "Implementation of 'Pay' Models and the Existing Public Trustee Model in the Digital Broadcast Era," in this volume.

Government-Created Scarcity: Thinking About Broadcast Regulation and the First Amendment

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INTRODUCTION

> *[D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them.*
>
> —Red Lion v. FCC

Attempts to articulate a coherent First Amendment rationale for the affirmative government regulation of broadcast programming are often filled with puzzles and paradoxes[1]:

- **Scarcity**. Some people cite broadcasting's alleged spectrum "scarcity" as a regulatory First Amendment rationale. But whether scarcity is defined in absolute terms (e.g., "there is very little of the broadcast spectrum to go around") or as a surfeit of demand over supply (e.g., "there are more who wish to broadcast than there are frequencies available"), it is difficult to explain why broadcast frequencies should be deemed more scarce than other equally desirable yet limited commodities. The physical world of "shoes and ships and sealing wax," to quote Lewis Carroll, is one of inherent limits on number and on amount of availability. Are broadcast frequencies any different? Newsprint and brilliant ideas are scarce, but we scarcely presume to regulate them.

- **Interference**. Some people cite the broadcast spectrum's susceptibility to "interference" as a basis for program regulation, yet these interference problems could be solved without program regulation. We could sell or auction off broadcast frequencies, for example, give the recipients a property right against interference, and allow them to enforce those rights in the courts, just as we allow the courts to handle problems of property trespass (or "property interference").
- **Public Property**. Some people maintain that a broadcaster's use of spectrum is analogous to the use of "public property" (e.g., as in "the public's airwaves"), and hence that use can be encumbered with content regulations. But, if anything, First Amendment doctrine has always viewed individual speech uses of governmentally owned public property as deserving the highest form of protection. Could individuals who use public parks for speech purposes be asked to present contrasting views on issues of public importance that they raise?
- **Trustee**. Some people seek to describe broadcasters as "trustees" for the public, required to preserve on their behalf the full diversity of the broadcast marketplace of ideas. Yet by what process did these broadcasters become anointed as trustees? Could we merely define the *New York Times* as a "trustee" and then justify affirmative content regulation of its pages? And if not *The New York Times*, then why CBS or NBC?

In short, it is not immediately apparent why broadcast stations can legitimately be required to broadcast a rebuttal by a person attacked on one of its programs, e.g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), but a daily newspaper of mass circulation cannot, e.g., *Miami Herald v. Tornillo*, 418 U.S. 241 (1974). Perhaps it was for this reason that the Supreme Court failed to insert even one footnote reference or citation to *Red Lion* in its *Tornillo* decision only five years later.

Despite the flawed nature of these rationales, a substantial rationale for the regulation of broadcast programming within the parameters of the First Amendment *does* exist. Its foundation is derived from the special characteristics of the broadcast medium itself, and its earliest rudiments can be identified in *Red Lion*. To understand the nature of this rationale, it is necessary to start with basics.

SPEECH: AN INTERFERENCE-BASED MEDIUM, PART I

> *When two people converse face to face, both should not speak at once if either is to be clearly understood.*
>
> —Red Lion v. FCC

Speech is an interference-based medium, as anyone can attest who has attended a loud cocktail party or a Wolfgang Puck restaurant. The human voice uses audible frequencies that can be interfered with by other voices. We have all learned various coping strategies to make ourselves heard in the face of such obstacles.

One strategy typically involves raising one's voice—increasing its volume or amplification, as it were.[2] This can be of short-term utility, for it becomes ineffective if others respond in kind. One could also use bullhorns or other various methods of amplification, but again, if others adopt the same technique, communication becomes more difficult.

A second strategy involves lowering one's voice, moving closer to the person with whom one is conversing and talking more confidentially.[3] This can be successful up to a point—in loud restaurants, perhaps, but not at rock concerts.

A third strategy, and one that we have all learned so well it is virtually unconscious, might be simply described as using the rules of polite conversation. At their most basic, these rules involve the following: First I speak, then you speak, then I respond, then you reply, etc. In groups, of course, this process becomes more intricate, but most of us have thoroughly mastered it by adulthood and rarely think about it.[4] In essence, we have learned how to share the frequencies occupied by the human voice. We might call this strategy *channel sharing*. Put in these terms, all human speech occupies just one channel, the equivalent of one broadcast frequency.

Our ordinary conversational speech strategies are so familiar to us that we have forgotten how rule-bound our conversations are. In a college classroom, for example, students will rarely ask, "Why is the teacher doing all the talking?" It is assumed in such a context that teachers set the conversational rules, calling upon students when they wish, and occupying the remainder of the available spectrum space themselves.

In formal settings, however, such as town hall meetings, city council meetings, legislative debates, and Supreme Court oral arguments, more formal conversational rules are needed. Because control over audible speech frequencies in such settings is tantamount to political power, democracies apply a second-order set of rules to them. These seek roughly to equalize the time available to all similarly situated speakers, so that all may be given an equal opportunity to persuade their audiences. These rules can be highly detailed—such as "Robert's Rules of Order."

Perhaps the most important aspect of these rules, for our purposes, is an apparent paradox: that to maximize freedom of speech in such formal settings, it is first necessary to curtail it. The time allocated to one speaker in a legislative debate must be limited in order to allow others to speak. Put in almost Orwellian terms, freedom of speech rests on censorship. The speech of one must be time-limited in order to allow all to have their own chances to speak.

The Supreme Court may be the closest we have to an actual "shrine" for the First Amendment. Yet the bailiff's gavel, which raps the proceedings into silence at the start of oral arguments, is a form of court-enforced censorship. If two spectators insisted on continuing a conversation—exercising their First Amendment speech rights, as it were—they would be forcibly ejected from the proceedings. Moreover, in oral arguments, each advocate is given a time limit—say, a half an hour—to maximize speech opportunities for all the advocates. Could one such advocate successfully argue the need for at least an hour to present arguments fully, that the Court would be violating the advocate's First Amendment speech rights were it to deny that amount of time? Clearly not.

What relation does this discussion have to the problems of broadcast regulation?

BROADCASTING: AN INTERFERENCE-BASED MEDIUM, PART II

> *Rather than confer frequency monopolies on a relatively small number of licensees, . . . the Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week.*
>
> —Red Lion v. FCC

Broadcasting is also an interference-based medium. Two stations on the same frequency, in the same geographical area, or with enough power substantially to reach each other, will interfere with each other's signal, so that it is difficult to understand either one. This describes the early days of radio.[6]

Just as humans have created tacit speech rules to maximize opportunities for all to speak, so too has the government created "rules of the road" to rationalize and provide for efficient use of the broadcast spectrum. It is worth deconstructing this process into explicit steps, however, both to elucidate the process and to disentangle from it the frequently confused First Amendment rhetoric of the courts.

The allocation and regulation of broadcasting frequencies in this country has required the following steps:

1. **Reservation of spectrum for broadcast speech.** First, the government must reserve sufficient portions of the spectrum for "public" speech (broadcasting), as opposed to "private" speech (police, fire, ship-to-shore, etc.), and to impose penalties for violating these regulatory borders. This preliminary step may seem quite unexceptional, yet it is worth stopping for a moment to consider its First Amendment implications. Because the regulatory division of spectrum by the Federal Communications Commission (FCC) has not been challenged in court under a First Amendment theory, let us hypothetically assume that an individual has filed a First Amendment action against the FCC, arguing that it has allocated too much spectrum space for police communications and

too little for broadcasting, thereby depriving the plaintiff of an opportunity to attempt to speak via the broadcast spectrum. What level of First Amendment scrutiny would a court apply to this question?

Strict scrutiny would not seem to be applicable, for the plaintiff's opportunity to speak is not being restricted because of its content. Intermediate scrutiny—requiring a substantial governmental interest and narrowly drawn means—might apply, but the governmental action in question, unlike the imposition of must-carry rules on either cable television systems[8] or individuals bearing draft cards,[9] for example, is not one in which the government is balancing speech against non-speech interests. Instead, where speech interests are balanced against other valid speech interests, it would seem most plausible to apply reasonable basis scrutiny, since one set of speech interests would not appear to warrant greater scrutiny (and justification by a higher governmental burden of proof) than the competing speech interest.[10]

In other words, the FCC's allocation of spectrum space between public and private uses should only be overturned if it is arbitrary or otherwise lacks a reasonable basis.

2. **Allocation of spectrum between competing broadcast uses.** Second, the FCC must decide how much spectrum to allocate to radio (AM and FM), and to television (VHF, UHF, and digital). Again, it would be difficult to mount a First Amendment challenge to these noncontent-related spectrum allocations, and any court asked to do so would probably reject a challenge under the reasonable basis test.

3. **Allocation of content-related uses within spectrum allocations.** Third, the FCC must address an apparently more difficult question: reserving portions of spectrum for specific content-related uses, such as public versus commercial broadcasting. Assume a twenty-four-station radio market in which the FCC has reserved four frequencies for non-commercial educational broadcast stations and twenty for commercial stations, and assume further that all the commercial frequencies are occupied but two of the non-commercial frequencies are vacant. Could a new commercial applicant mount a successful First Amendment challenge to this scheme, arguing that the FCC improperly allocated too much

spectrum space for educational broadcasting, thereby depriving the plaintiff of an opportunity to engage in speech (commercial broadcasting)?

In this instance, the plaintiff might make the additional argument that the FCC has engaged in a form of content discrimination (as a distinction between non-commercial and commercial broadcasting can only be made by reference to the station's program content), and hence strict scrutiny should apply. Again, it seems probable that a court would apply reasonable basis scrutiny to reject plaintiff's argument, since the FCC made its spectrum allocation decision without reference to any particular program or viewpoint.[11]

4. **Allocation of spectrum by time division**. In the early days of radio, Federal Radio Commission (FRC) and the FCC occasionally allocated one frequency to two applicants—and in some instances to both a commercial and a non-commercial applicant. Each would receive the right to operate on the same frequency, for example, twelve hours a day.[12] Today, there is no reason, either in spectrum physics or constitutional law, why the FCC might not follow a similar course—dividing, for example, one broadcast frequency among two applicants, giving each twelve hours a day; or dividing one frequency among seven applicants, giving each one day of the week.[13]

The FCC might even create a common carrier system, the ultimate time-division scheme, in which the licensee assigned the frequency would be required by law to make it available to any applicant who wished to use it on a first-come, first-served basis. Under such a system, practical notions of spectrum "scarcity" would vanish. Every individual would have a "right" to broadcast, just as every individual has a "right" to stand in line for admission to the new Getty Museum. Sooner or later, with patience and enough money, every individual could be a broadcaster, if only for a limited time period.[14]

Could a plaintiff challenge such FCC time divisions, asserting a First Amendment right to receive *more time* than others—more than twelve hours a day in a split frequency, for example, or more than one day a week in a seven-day allocation scheme, or more time than anyone else under a common carrier scheme?

Again, it would seem that reasonable-basis scrutiny would generate a "No" answer. One applicant, having been awarded twelve hours out of twenty-four, for example, would seem to have no particular First Amendment right to obtain more time—at a cost of reducing the other tenant's time to, say, six hours. Whatever the policy merits of any particular FCC time allocation, therefore, it would not seem to be subject to compelling or even intermediate scrutiny.[15]

GOVERNMENT-CREATED SCARCITY: A FIRST AMENDMENT RATIONALE FOR BROADCAST REGULATION

> *It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press.*
>
> —Red Lion v. FCC

We have now arrived at the crux of the matter. What is apparent is that traditional notions of spectrum "scarcity" are misconceived. The broadcast spectrum is not inherently more or less scarce than a wide range of other tangible and intangible commodities. There is, of course, a physical limit on the spectrum needed to present one's argument before a city council or the Supreme Court, just as there is a physical limit on the spectrum needed to broadcast. What is critical for our purposes, however, is the way the government has chosen to divide up the opportunities for speaking—whether before the Supreme Court or a broadcast audience.

The most fundamental decision in the FCC's entire scheme of allocation is its decision to allocate an entire frequency to one applicant—instead, for example, of creating a common carrier system in which anyone and everyone would be able, for a specified amount of time, to become a broadcaster simply by purchasing the time to be one. The broadcast spectrum is scarce because the government has legally limited it to a few speakers instead of many, not because of its inherent physical characteristics or the intensity of demand for its utilization.

The FCC's "rules" of speech allocation in an interference-based medium, in other words, tilt substantially in favor of a very few fortunate licensees, who are able, also according to these rules, to control virtually all of their frequency's time to the general exclusion of other speakers.[16] *This legally created scarcity* may be perfectly reasonable, and even good frequency allocation policy,[17] but it suggests an important justification for the regulation of broadcast programming.

Take, for example, the problem of political broadcasting time. Various proposals have been made to require broadcast licensees to provide political candidates with free time in which to present their views to the electorate.[18] Licensees have typically responded by invoking analogies to newspapers and print media, arguing that such a regulation would deprive them of their First Amendment rights to control the editorial content of their stations' programming.

Conceptually, however, the First Amendment would seem to allow the FCC to give a broadcaster a license to use the frequency twenty-four hours a day for most of the year, but withhold, say, one hour a day from that licensee's control during the sixty days before an election. During this sixty-day period, the FCC could require this hypothetical licensee to turn off the transmitter one hour each day. During this same hour, the government would simultaneously turn on its own transmitter tuned to the same frequency. The government could then make that hour equally and publicly available to all candidates in the election on a first-come, first-served basis.

What would be such a licensee's First Amendment argument against such an allocation system—that it had a constitutional right to broadcast twenty-four hours a day all year, and it could not be forced to relinquish (or it had a right to obtain the extra) one hour a day during the period prior to an election? To state such an argument is to reject it. Such a system would withhold one hour a day from the licensee in order to create speech opportunities for dozens or hundreds of candidates. Such a balancing of speech rights would surely pass reasonable basis scrutiny.

Now let us assume that the government might reasonably conclude that such a system—requiring it to operate thousands of transmitters across the country, duplicating in every community all the existing licensees' transmitters so political candidates could broadcast for one hour a day during a sixty-day period prior to an election—would be inefficient. Could it instead require its existing licensees to make *their* transmitters available for such a purpose? Under what conditions would such a requirement be constitutional?

The answer requires a distinction between two questions: whether the licensee can be required to share *frequency* with others, and whether the licensee can be required to share *facilities* with others. Clearly the FCC could require a licensee to relinquish one hour a day for sixty days for use by candidates. Conceptually, the FCC could conclude that the licensee had never been given that time. Could the FCC also require the licensee to turn over the use of its transmitter and other facilities (cameras, tape playback systems, etc.) for candidates to use? The answer would seem to be "Yes" under several possible scenarios.

First, the FCC might reasonably conclude that licensees must make their facilities available to candidates in partial exchange for the value of their allocation of spectrum, which they have essentially received without payment. Under this approach, the value of the licensee's spectrum would first be estimated, then the rental value of the licensee's facilities would be deducted. So long as the value of the frequency exceeded the value of the rentals, there would be no charge.[19]

Second, and alternatively, the FCC might deem licensees to have made an implicit choice: that they would rather accept a system under which they would occasionally provide free channel capacity and the use of their facilities to political candidates for a short time during the year than a system in which they had *no control* over programming—as in a common carrier regime. In other words, in exchange for giving licensees considerably more than they might otherwise be entitled to (i.e., virtually complete control over their frequency for most of the year), the government would be entitled to ask for something in exchange—the periodic and limited use of their frequency.

The history of the 1934 Communications Act suggests support for this second scenario. Broadcasters wanted assurances from Congress that they would have a wide range of editorial rights and not be treated as common carriers; in turn, Congress wanted a commitment from the broadcasters that they would provide programming in the public interest (e.g., equal opportunities, etc.). This 1934 version of "Let's Make a Deal" generated two important legal provisions: the prohibition on "common carrier" regulation (in Section 3[h] of the Act), and the better-known requirement that broadcasters operate in the "public interest." What is not generally understood is that Section 3(h) is the linchpin in the government's system of legally created or government-created "scarcity" in broadcasting. Legally prohibiting the FCC from ever adopting a common carrier system was tantamount to excluding the vast majority of the American public from ever having the right to speak over the broadcast medium.[20] The government made this concession to the broadcasters in exchange for their commitment to provide some measure of public interest programming.

These two scenarios (sharing frequency or sharing facilities) differ significantly. In the first scenario, the costs of the use of the licensee's facilities are offset against the value of the licensee's free spectrum. In the second scenario, the use of the licensee's facilities, either by outside speakers such as political candidates, or by the licensee on behalf of outside audiences as in children's programming, is offset against the value of the licensee's receiving almost total control over the allocated spectrum (in contrast with the diminished value of that spectrum to the licensee under a common carrier system).[21]

CONCLUSION

A licensee . . . has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens.

—Red Lion v. FCC

What is interesting about this famous Supreme Court statement is how clearly it does not apply to newspapers or the print media. It would be difficult, in light of the *Tornillo* decision, to paraphrase thus: "A newspaper . . . has no constitutional right to be the one who holds the right to print or to monopolize that newspaper to the exclusion of his fellow citizens."

It might be possible to interpret the first clause as holding only that anyone, whether a potential broadcaster or newspaper publisher, has an equal right to *seek to become* a broadcaster or publisher. The second clause, however, is more difficult. Virtually every Supreme Court decision on the subject would reject the conclusion that a newspaper publisher has no constitutional right to "monopolize" that newspaper "to the exclusion of his fellow citizens." As the Court said in *Tornillo*, the function of a newspaper editor is to edit, and that inevitably results in excluding the views of others as the editor sees fit.

The easiest way to understand the validity of this second clause from *Red Lion* is, in the context of broadcasting, to read it in the context of "government-created scarcity." A broadcast licensee has no constitutional right to monopolize the frequency received from the FCC because, along with that frequency, the broadcaster has also received a government-created legal right to exercise almost total control over it, excluding virtually anyone from its use. In exchange for this considerable grant of editorial control, the government can legitimately require that a licensee reasonably "share" its frequencies with others, either by turning it over to them for short periods of time (as with political candidates under Section 315), or by producing programming on their behalf (as with children's television programming). By contrast, although a newspaper publisher uses scarce newsprint to publish, that newsprint has not been made scarce by an action of the government in order to allocate an interference-based medium among other potential users, nor could the government make such a decision, because printing does not involve an interference-based medium.[22]

Red Lion's basic assumptions only make sense in the context of an interference-based medium that the government has rationalized not by opening it to all under, say, a common carrier policy, but instead by giving licenses almost total editorial control over their frequency in exchange for "public interest" programming obligations on behalf of the public.

Endnotes

1. Significant First Amendment differences exist between "affirmative" and "negative" broadcast regulation. Affirmative regulations require broadcast licensees to transmit more speech than they would otherwise wish and include, for example, the equal opportunities doctrine, the recently departed fairness doctrine, and requirements to air children's television programming. Negative regulations require broadcast licensees to transmit *less* speech than they would otherwise wish and include, for example, restrictions on obscenity, indecency, and certain commercials (e.g., lotteries). Although the constitutionality of both affirmative and negative regulations rests on various special characteristics of the broadcast media, this paper primarily addresses the general constitutionality of affirmative program regulations.

2. Early radio broadcasters often increased their power in order to drown out stations on the same frequency. One can still experience this phenomenon today by taking an automobile trip in the Southwestern U.S. deserts and listening to one radio station overcome another as one travels between transmitters.

3. The FCC uses this technique to separate stations around the country that are on the same frequency by lowering their broadcast power so they do not interfere with each other.

4. Children, it should be noted, must learn this technique; it does not seem to be genetically inherited. Young children frequently interrupt adult conversations, apparently without realizing that they are breaking a code of conversation.

5. To carry the analogy further, the Supreme Court has ruled in *Buckley v. Valeo*, 324 U.S. 1 (1976), that money is tantamount to speech in an election context, and that the amount of money a candidate spends on the campaign cannot be limited without a "compelling" governmental interest. Should the Supreme Court be required to allow advocates to *pay* for their oral advocacy time? Would it be deemed a violation of an advocate's First Amendment rights to prevent a candidate from purchasing substantially large amounts of time—perhaps hours or even days? Clearly, time allocation rules are necessary in any speech forum, and depriving one person of unlimited time to speak in order to allow others to be heard cannot alone be thought of as violating the First Amendment.

6 "Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos. It quickly became apparent that . . . [w]ithout government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard." *Red Lion v. FCC.*

7 Were an advocate before the Supreme Court to file a similar law suit, arguing that the Court had abridged the advocate's speech rights by allowing only a half hour for presentation of the merits of the case, the Court's choice of a level of scrutiny (strict, intermediate, or reasonable basis) might be resolved by similar considerations.

8 See *Turner Broadcasting System v. FCC*, 117 S.Ct. 1174 (1997).

9 See *United States v. O'Brien*, 391 U.S. 367 (1968).

10 Assume, for example, that a city council allowed each citizen five minutes to speak before it on a proposed regulation, and allocated two hours for the entire hearing (allowing a total of twenty-four citizens to speak). This would mean that the twenty-fifth individual wishing to speak would receive no time at all. Assume that this twenty-fifth citizen filed suit, arguing that the city's allocation of time improperly abridged that citizen's First Amendment rights. The appropriate response would presumably be that allocating fewer than five minutes to each speaker, thus giving the twenty-fifth speaker time to speak, would curtail the speech of the first twenty-four, thereby possibly preventing them from addressing the merits of their position in sufficient depth. A court asked to resolve this question might legitimately apply reasonable-basis scrutiny, since there is no apparent reason why the twenty-fifth speaker's speech interests would be entitled to greater scrutiny than the first twenty-four.

11 Compare *Turner Broadcasting System v. FCC*, 117 U.S. 1174 (1997). Is there a limiting case here—for example, an FCC allocation of twenty-three frequencies for non-commercial applicants and one for a commercial applicant, where only two of the non-commercial frequencies were occupied and dozens of commercial applicants are waiting in the wings? Even in this case, a successful plaintiff would have to argue not a right to a broadcast frequency, but a right to engage in commercial broadcasting, a somewhat difficult case to make.

12 Commercial licensees ultimately squeezed out their non-commercial partners, successfully arguing to the FCC that they should be given more and more of the frequency's time allotment, since they could use it more "efficiently" (i.e., they could broadcast longer hours, given their access to advertising revenues, whereas non-commercial broadcasters could not fill their allotment of hours due to a lack of funding). See R. W. McChesney, *Telecommunications, Mass Media, & Democracy: The Battle for Control of U.S. Broadcasting, 1928–1935* (New York: Oxford University Press, 1994).

13 Although the various applicants for one frequency could each operate its own transmitter, it would make commercial sense for them to share a transmitter, studio, and facilities in a manner similar to newspapers' Joint Operating Agreements.

14 Under such a system, the FCC might also require the licensee to make available some portion of time on a free or substantially reduced-cost basis, much like it authorizes local franchising authorities to require cable television systems to provide public access channels today.

15 It could be argued, for example, that a common carrier system is inherently defective under the First Amendment, since it would prevent any one licensee from building up a coherent body of programming (as a newspaper can create a coherent body of

text), and that divisions of spectrum in force today, which give almost total control to one licensee, are constitutionally required. Whatever the merits of such arguments on a policy level, it seems doubtful that they would rise to a constitutional level, in which a court could be asked to strike down a common carrier allocation system on First Amendment grounds. This is primarily because such a spectrum allocation balances one set of speech rights against another. A common carrier system of broadcast speech might deprive one speaker of the substantial amounts of broadcast time that today's licensees possess, but this would be counter-balanced by the First Amendment benefits resulting from a system in which thousands or millions of citizens would be given their first right to speak over the broadcast media.

[16] See *CBS v. DNC,* 412 U.S. 94 (1973), deferring to the FCC's allocation scheme in which virtually all editorial control over each frequency is given to individual licensees, subject only to such regulations as the FCC's fairness doctrine.

[17] The FCC's allocation scheme is not necessarily a bad one; indeed, it may be the most reasonable method for providing high-quality diverse programming. The current scheme does, however, have profound implications for the constitutionality of program regulations.

[18] See T. Westen, *A Proposal: Media Access for All Candidates and Ballot Measures*, in this volume.

[19] See, e.g., Charles Firestone, "The Spectrum Check-Off Approach," paper prepared for a meeting of The Aspen Institute Working Group on Digital Broadcasting and the Public Interest, January 25-27, 1998, Queenstown, Md., in which licensees would be offered a choice: pay for their portion of the spectrum and allow the candidates to buy time with public funds (derived from the spectrum fee), or not pay for their portion of the spectrum and provide candidates with offsetting free time.

[20] By analogy, it would be as if a city council announced that, in the interest of conserving time, in the future only a few carefully selected "trustees" would be able to present testimony before it on matters of public interest. If such a system were implemented, it would be a mistake to attempt to justify it on the basis of "spectrum scarcity."

[21] The law of "unconstitutional conditions," though never thoroughly developed by the Court, might also be useful here. In *Sherbert v. Verner,* 374 U.S. 398 (1963), for example, the Supreme Court invalidated, on First Amendment grounds, the dismissal of a government employee for failing to work on a Saturday (the employee was a Seventh Day Adventist whose religion prohibited work on Saturdays). The Court ruled that a Saturday work requirement imposed an unconstitutional burden upon a protected constitutional right. Broadcast licensees might argue that requiring them to present the views of others over their own facilities for a relatively brief period of time prior to an election amounts to an unconstitutional condition placed on their speech (use of the spectrum). The appropriate rebuttal is to point out that in *Sherbert v. Verner,* the government was asking an employee to give up a constitutionally protected right (practice of religion) in exchange for an economic opportunity (employment). The Court held that employment cannot be so burdened. In the broadcasting case, however, licensees are being asked to give up control over a small portion of their speech facilities in order to maximize the speech rights of others. In this situation, the constitutional equities favor the outside speaker. The "condition" imposed is a speech-favoring condition, an analysis more appropriate to an interference-based medium.

22 If trees were struck by a sudden plague, making newsprint physically scarce, would the government be able to limit the number of newspapers published, and in so doing require publishers to "share" their facilities with others, so that all views could be expressed? Since the marketplace of supply and demand would rationalize this newsprint by questions of cost, this might not be necessary.

Self-Regulation and the Public Interest

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Can self-regulation of broadcasting serve the public interest? And if so, how should such a policy be implemented?

Before these questions can be addressed it is necessary to define terms. "Self-regulation," in this context, means no government regulation of broadcast content. In addition to eliminating rules that dictate programming decisions, this includes the absence of rules disguised as "policy statements" from government agencies, programming guidelines, quid pro quo deals, social contracts, social compacts, government-inspired industry "codes" or whatever else might be the current raised eyebrow technique for extracting concessions from licensed media.

With this understanding of self-regulation, the answer to the second question is straightforward: self-regulation should be implemented by ending direct and indirect government content controls.

The first question is not as easily answered, however, given the amorphous nature of the public interest standard. But experience suggests that the public is better served when electronic publishers are free to address audience interests. To the extent that some observers believe that important informational needs will be unmet when broadcasters merely respond to what interests the public, non-regulatory solutions provide the most direct and effective way of meeting these needs. Public broadcasting, the public library of the air, plays an important role by providing additional meritorious programming.

JUST SAY NO!

The seemingly self-evident proposition that self-regulation eliminates government control over private editorial decisions is not always so clear to Washington policymakers. If it were, the question of how to implement self-regulation would not arise. Many of the current exemplars of "self-regulation" lack an important component: the "self." Accordingly, they do not serve as models for purposes of this analysis.

The V-chip requirement of the *Telecommunications Act of 1996* is an example of "self-regulation" that involves a great deal of government involvement. Section 551 of the Act, which implements the V-chip and its television ratings scheme, is expressly described in the law as "voluntary." Although Section 551(b) empowers the Federal Communication Commission (FCC) to prescribe "guidelines and recommended procedures for the identification and rating of video programming that contains sexual, violent, and other indecent material about which parents should be informed before it is displayed to children,"[1] that provision was to take effect only if the Commission determined (in consultation with "appropriate public interest groups and interested individuals from the private sector") that video programming distributors [had] not "established voluntary rules for rating video programming that . . . are acceptable to the Commission" and "agreed voluntarily to broadcast signals that contain ratings of such programming."[2]

After the first ratings system proposed by the television industry met with congressional opposition,[3] the industry offered a revised proposal with more detailed program ratings. However, when the NBC television network declined to "volunteer" for the revised system, Senator John McCain, chairman of the Senate Commerce Committee, issued the following warning to the network:

> If [NBC] fail[s] to heed this call [to join with the rest of the television industry] by remaining the one company in the industry that puts its own interests ahead of its viewers, I will pursue a series of alternative ways of safeguarding, by law and regulation, the interests that NBC refuses to safeguard voluntarily. These will include, but not be limited to, the legislation offered by Senator [Ernest] Hollings to channel violent programming

> to later hours, as well as urging the Federal Communications Commission to examine in a full evidentiary hearing the renewal application of any television station not implementing the revised TV ratings system.[3]

After confirming that the modified ratings system followed "the threat of legislation," Senator McCain told the *Washington Post* that the system "was voluntary in that we [in Congress] did not dictate the terms of the agreement, and, yes, we expect everyone to comply with it."[4] The FCC approved the revised ratings system and technical rules in March 1998.[5] Ted Turner best described the nature of the V-chip affair: "We don't really have any choice. We're voluntarily having to comply."[6]

As this example demonstrates, self-regulation can be a tricky concept in the context of media regulation, because broadcasters periodically must seek license renewal and other approvals from the FCC. Most such cases go unchallenged, perhaps for the same reason the government has leverage in the first place: Issues may come and go, but the power of the licensing agency always looms large in the life of the licensee. Accordingly, the misnomer of "self-regulation" persists.

Yet where such tactics are subjected to judicial scrutiny, government assertions of noninvolvement in program regulation wear quite thin. For example, the U.S. Court of Appeals for the D.C. Circuit struck down a requirement that noncommercial radio stations make audio tapes of programs in which "issues of public importance" were presented. It found that both commercial and noncommercial broadcasters are subject to "a variety of *sub silentio* pressures and 'raised eyebrow' regulation of program content."[7] Accordingly, it said, even a seemingly neutral regulation could be invalid to the extent it increases the likelihood that broadcasters "will censor themselves to avoid official pressure and regulation."[8] As the D.C. Circuit noted in another case, "[t]alk of 'responsibility' of a broadcaster in [a licensing proceeding] is simply a euphemism for self-censorship. It is an attempt to shift the onus of action against speech from the Commission to the broadcaster, but it seeks the same result—suppression of certain views and arguments."[9]

Similarly, a federal district court struck down the so-called "family viewing policy" adopted in the mid-1970s, rejecting the claim that it was merely "voluntary" self-regulation. The FCC had initiated a series of meetings with network, independent TV, and National Association of Broadcasters (NAB) officials "to serve as a catalyst for the achievement of meaningful self-regulatory reform."[10] The FCC's message was amplified in speeches by its chairman to broadcast groups and in suggestions to the press that public hearings would be convened if voluntary action was not forthcoming.[11] The FCC's "suggestions" were adopted by the networks and were to be enforced through an industry code. The self-regulation program was adopted just in time for the FCC to report to Congress on the status of televised sex and violence. In striking down the policy, the U.S. District Court for the Central District of California found that "[t]he existence of threats, and the attempted securing of commitments coupled with the promise to publicize noncompliance . . . constituted per se violations of the First Amendment."[12] The court characterized the FCC's tactics as "backroom bludgeoning,"[13] and although the District Court opinion was vacated on appeal on jurisdictional grounds, the Court of Appeals agreed that "the use of these techniques by the FCC presents serious issues involving the Constitution, the Communications Act and the Administrative Procedure Act."[14]

In short, these examples demonstrate what self-regulation is not. Efforts to promote official government policies through the use of threats, indirect pressure, or policy guidelines masquerading as industry "codes" are not self-regulation. For purposes of this analysis, the question remains whether the public interest will be served without the use of such pressure tactics.

DEREGULATION AND THE PUBLIC INTEREST

In the absence of regulation, will broadcasters provide public interest programming? At the outset it is important to note that this question contains two embedded assumptions—first, that the "public interest" concept is sufficiently defined to be understandable, and second, that regulation leads to the creation of more such programming, whatever it may be. The D.C. Circuit recently questioned the first assumption in the Equal Employment Opportunities context, noting that the FCC "never defines exactly what it means by 'diverse programming'" (a traditional public interest shibboleth), and described the government's formulation of the interest as "too abstract to be meaningful."[15] Despite the ambiguity inherent in this concept, however, it is possible to examine the overall question in light of recent market and regulatory experience.

Inexplicably, most analyses of public interest programming focus solely on broadcast television, to the exclusion of other video sources. For example, the FCC's analysis of educational television in its proceeding on children's television expressly excluded programming on cable television systems and other subscription video services, such as direct-broadcast satellite systems.[16] It did so despite the fact that the Supreme Court had a few weeks before the *Children's Television Order* accepted the FCC's argument that "[c]able television broadcasting . . . is as 'accessible to children' as over-the-air broadcasting, if not more so," and that most people receive television via cable, which provides entire networks dedicated to education.[17] In addition, the FCC's Order did not mention VCRs, for which there is an abundant supply of educational programs, and which, by the Commission's own surveys, are present in 88 percent of American households. By some estimates, VCRs are present in 95 percent of homes with children.[18]

By broadening the assessment of "public interest" programming to include television as it exists in most American homes, the answer to the question of whether broadcasters will choose to provide public interest programming in the absence of regulation comes out quite differently than in most FCC studies. Put another way, to the extent the government asserts that cable television is "pervasive" when it seeks to regulate program content, it should not be able to deny that fact when seeking to assess what programs are available on TV. In this regard, Professor Eli Noam of Columbia University, in a recent study encompassing both broadcast and multichannel television sources, found that public interest programming on commercial television has been growing at a rapid rate.[19] He defined such programs as those that "go beyond pure entertainment and provide a cultural, civic, informational, or educational function."[20]

Noam identified a significant number of cable television networks that provide what he considered to be public interest programming, including A&E Television, Bravo, C-SPAN, CNBC, CNN, Court TV, Discovery, Disney, The Fox News Channel, The History Channel, The Learning Channel, Mind Extension University, The Weather Channel, and others, including regional news channels. He also identified several channels, such as Black Entertainment Television, that address the interests of ethnic minorities. In total, the number of channels found to provide "primarily public interest programming" was considered to be quite large, representing almost half of the available cable channels considered in the study.[21] Noam also attempted to quantify the growth rate of "public interest" programming availability, and found that the annual growth rates for various programming categories were "extraordinarily high," including 12.86 percent for news programs, 13 percent for documentary and magazine programs, 12.4 percent for health/medical programs, 12.7 percent for programs on science and nature, 8.8 percent for cultural programs, 7.62 percent for high-quality children's programming, 9.41 percent for programs devoted to education, 8.8 percent for religious programming, and 9.48 percent for foreign-language programming.[22] Overall, he found that the share of public interest programming hours compared to total program hours grew from 28.2 percent to 43 percent between 1969 and 1997.[23]

The market for public interest programming is not limited to cable television. Noam also found that the news coverage of traditional local broadcasters "has expanded considerably in terms of hours," and that serious news magazine programs have proliferated on the broadcast networks.[24] A study by A. H. Belo Corp., which owns seventeen full service television stations, found that the amount of time devoted by the four major broadcast network affiliates to news, public affairs, and educational programming in its seventeen markets ranged from 20 to 34 percent of the total broadcast schedule.[25] In addition to traditional news programming, the NAB estimated that television stations devote approximately $6.85 billion to community service annually, including $4.6 billion in time for public service announcements, $2.1 billion raised for charitable causes, and $1.48 million in air time devoted to political debates, candidate forums, and convention coverage.[26]

Whatever the extent of such public service, it is far from clear that FCC programming mandates that require broadcasters to transmit a specified number of hours of "quality" programming will outperform the market in providing such fare. When in 1996 the FCC adopted a "guideline" that broadcasters should air three hours per week of educational programming, the record before the Commission was quite ambiguous about whether the rule would lead to an increase in the level of such programming. An academic researcher who completed surveys of forty-eight randomly selected television stations in 1992 and 1994 and submitted them to the FCC found that commercial stations reported airing on average 3.4 hours per week of regularly scheduled, standard-length educational programming (although the researcher deemed some of the claims of educational value for the shows "frivolous").[27] A survey by the NAB in 1994 of 559 stations found that the average station aired almost four and one-third hours per week of educational and informational programming. Another survey by the Association of Local Television Stations, polling seventy-eight local independent stations, found that the average station aired 3.77 hours per week of educational programming in the first quarter of 1995.[28]

Although the FCC described the various surveys as "inconclusive,"[29] it nevertheless adopted a rule that appeared to require—on average—less educational programming than broadcasters were already providing. The FCC could have adopted a number other than three hours for its programming guideline, of course, but this assumes that a rule that requires educational programming necessarily produces education. More importantly, it does not compare the results of bureaucratically driven demand with the demands of the consuming public for such programming. In this regard, it is all the more curious that the FCC overlooked the emergence of a market for educational programming on media that are not covered by the children's television rules.

It also is worth noting that political coverage by television stations generally has expanded when FCC rules governing such programs have been relaxed or repealed. The presidential debates were televised in 1960 only after the "equal opportunities" provisions of the Communications Act of 1934 were suspended.[30] Over the years, televised debates became a fixture of political campaigns because the FCC expanded the news programming exemptions to the equal opportunities rule.[51] More ambitious experiments with free candidate time were made possible during the 1996 election cycle because the FCC relaxed those rules, too.[52] The Supreme Court recently acknowledged the intrusive nature of political broadcasting regulation (whether by government rule or constitutional litigation) in *Arkansas Educational Television Commission v. Forbes*, when it noted that the threat of a third-party access requirement had caused the cancellation of a political debate.[53]

Another way to address this question is to examine the post-fairness doctrine experience. In 1975, fully 90 percent of radio stations in the United States were devoted to music formats. However, beginning in 1988 (the first year after the fairness doctrine was repealed), the number of stations in the informational programming category (including news, news/talk, talk, and public affairs formats) "rose meteorically."[54] Between 1987 and 1995 the number of AM radio stations devoted to informational programming more than quadrupled (from about 7 percent to almost 30 percent of all stations), and the number of information-format FM stations more than tripled (from about 2 percent to approximately 7.4 percent).[55]

MARKET "FAILURE" AND THE SEARCH FOR "QUALITY" PROGRAMMING

Despite the growth of news and informational formats in the absence of regulation, this trend has been criticized as leading to the proliferation of shallow or excessively partisan political talk shows. In this view, increased discussion of political issues on such media as talk radio may not adequately promote deliberative democracy or serve the public interest if it leads to political decisions based on "misleading or sensationalistic presentations of issues."[56] Thus, specifically referring to talk radio, former FCC chairman Reed Hundt urged broadcast licensees to "emphasiz[e] accuracy and truth over a quest for ratings and advertising dollars" and added "we need solutions to public disinformation and misinformation."[37] Among other things, Hundt suggested extending greater protections from litigation for broadcast journalists, while finding ways to ensure "fair" coverage and means "to assure the public that the news on TV will be impartial and that opinions on TV will be balanced."[38] But as former FCC commissioner James H. Quello asked in response, "In the eyes of what beholder?"[39]

The question of whether or not an unregulated marketplace produces "enough" valuable speech, or conversely, "too much" worthless or harmful speech assumes an ability to determine the optimal amount separate from the voluntary choices of speakers and listeners.[40] It presumes that the "public interest" should outweigh traditional First Amendment concepts of speaker and listener autonomy. Otherwise, as Thomas Krattenmaker and Lucas A. Powe framed the issue, "viewers will watch or read what critics and regulators like with insufficient frequency and will enjoy too often what commissioners and columnists abhor."[41]

Others, such as Cass Sunstein, would prefer to replace "consumer sovereignty" with the wise selection by regulators of such programming as "high-quality fare for children" and "public affairs programming."[42] Such a selection may "depart[] with consumer satisfaction," according to Sunstein, but it would not really deny "choice."[43] It would merely allow "democratic choices to make inroads on consumption choices."[44] Such "democratic choices," in this view, would lead individuals to make wiser consumption choices. "If better options are put more regularly in view," Sunstein has written, "at least some people would be educated as a result" and "might be more favorably disposed toward programming dealing with public issues in a serious way."[45]

To assert that bureaucratically determined programming decisions do not deny "choice" is pure sophistry. All program selection involves "choice" by definition. The central question is whether the choice should be made individually (e.g., "consumer sovereignty") or collectively, by elected officials or appointed regulators. Traditional First Amendment doctrine considers it a "fixed star in our constitutional constellation" that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[46] The First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."[47] No matter how well-intentioned the proposals to improve the quality of television may be, to the extent that they conflict with the choices of speakers and viewers, they are inconsistent with a concept of freedom in which "no one has a right to press even 'good' ideas on an unwilling recipient."[48] Freedom of speech and of the press "may not be submitted to vote; they depend on the outcome of no elections."[49]

Theorists in this debate generally seek to avoid a head-on collision with such basic constitutional doctrine by framing the choice as if it were between democracy and consumerism.[50] Thus, "democratic judgments" are placed in opposition to "consumption choices."[51] Former FCC chairman Mark Fowler's unfortunate metaphor for television—a "toaster with pictures"—is frequently invoked, seemingly making the choice a simple one: If the First Amendment (along with the public interest standard of the *Communications Act*) was designed to promote the Madisonian value of deliberative democracy, should not proper constitutional analysis require an official preference for political speech over consumer culture?[52] Or, as Owen Fiss has asserted, "we may sometimes find it necessary to 'restrict the speech of some elements of our society in order to enhance the relative voice of others,' and . . . unless the Court allows, and sometimes even requires, the state to do so, we as a people will never truly be free."[53]

This conception of the value of speech, however, treats the marketplace of ideas metaphor far too literally and sets up a simplistic dichotomy between consumers and voters.[54] Certainly the "marketplace" includes commercial speech, popular culture, and entertainment, but it also includes the market for politics, news, education, high culture, and information.[55] Alexander Meiklejohn wrote that political speech extends far beyond town hall debates to include literary and artistic expression.[56] For that reason, the First Amendment forbids government from deciding what material citizens "shall read and see" or "distinguish[ing] between 'good' novels and 'bad' ones."[57] For that matter, the First Amendment also bars the government from choosing policy papers from Washington think tanks for the reading pleasure of its citizens over trashy novels no matter how much such a selection may foster Madisonian values.[58] Such choices can never be "delegated to any of the subordinate branches of government."[59] The essential choice, then, is between "individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end."[60]

The assumption of some theorists is that democratic values and institutions will be strengthened if public interest regulation ensures that the public pays more attention of political debates and discussions, but that Madisonian goals would be betrayed in a world of limitless media choices because "consumption choices . . . disserve democratic ideals" where "people [can] screen out ideas, facts, or accounts of facts that they find disturbing."[61] This assumes that truly democratic goals are promoted by encouraging (or forcing) people to pay attention to this season's political contest for a given office or to the issues of a current referendum. (But see *A Clockwork Orange*.)

PUBLIC BROADCASTING AND THE PUBLIC INTEREST

The creation and funding of the public broadcasting system is the most direct way for the government to promote its vision of the public interest. It also is the least restrictive way. Unlike regulatory solutions, such subsidies promote democratic dialogue without infringing other constitutional values (unless the government seeks to use control over funding to benefit or burden particular speakers). Krattenmaker and Powe, among others, have noted that "to the extent the marketplace is perceived as impoverished, subsidies may be an effective way of correcting its inadequacies" so long as they are "true subsidies" rather than "extractions from media competitors."[62]

The challenge to public broadcasting is to find a reliable source for the subsidies it needs without having its editorial decisions compromised by political control. This is no small feat, but it is not substantively different from other regulatory questions. Those who argue that congress and the FCC should regulate commercial broadcasters because public broadcasting lacks adequate support fail to acknowledge that either approach requires the expenditure of political capital. It is beyond the scope of this paper to suggest a source of funding to support public broadcasting (e.g., through spectrum fees paid by commercial broadcasters, some other type of regulatory fee, or general revenues), but in the end, such decisions are little different from the decision to regulate. If Congress could muster the political will to pass a law requiring commercial broadcasters to provide free time for political candidates, and the FCC could adopt workable implementing rules, then the legislature similarly could adopt a means to provide permanent adequate funding for public broadcasting.

The more difficult issue involves avoiding political control over editorial decisions once funding has been provided. Public broadcasting historically has been a political battleground. Conservatives have charged that public broadcasting is biased toward the left; liberals have argued that it is influenced by corporate underwriting and pressure from conservative politicians.[63] Patrick Buchanan, then an advisor to President Richard Nixon, classified liberal commentators on PBS variously as "definitely anti-administration," "definitely not pro-administration," and "unbalanced against us," and conservative commentators as "a fig leaf."[64] Similarly, Clay T. Whitehead, the first director of the White House Office of Telecommunications Policy, told PBS officials that news commentary, "particularly from the Eastern intellectual establishment," would invite political attention.[65] Accordingly, in February 1972, Whitehead informed Congress that the Nixon administration opposed any permanent financing for the Corporation for Public Broadcasting unless local public stations were given greater power to control programming.[66] The administration had concluded that PBS should not be allowed to develop into a fourth network producing public affairs programming because of its belief that such programming would be hostile to administration policies.[67] Such an approach to government subsidies of speech, and resulting implementing policies, has resulted in litigation over the extent to which the one who pays the piper may call the tune.[68]

Experience with speech subsidies highlights the risk inherent in more direct forms of regulation. If government cannot be trusted to fund supplemental programs without succumbing to the impulse to censor, it is even more threatening to notions of free speech to permit direct regulation of content. Government may have an important role to play in bringing informational, educational, and participatory opportunities to those least able to participate in democratic institutions. But if it cannot adhere to constitutional boundaries when it performs this role, there is little reason to believe it will show greater restraint if given more regulatory power.

CONCLUSION

"Self-regulation" is not a policy option that needs to be "implemented." Properly understood, self-regulation is the absence of government regulation, and the only "implementation" that is required is for the government to stop regulating the content of broadcast speech. When it has done so in the past, public interest programming has been provided to a willing audience. To whatever extent policymakers believe that the amount of public interest programming is deficient, however, the public broadcasting system can play an important role in providing additional meritorious programming.

Endnotes

1. Under this section, program ratings would be devised "on the basis of recommendations from an advisory committee established by the Commission," which would be composed of "parents, television programming producers, cable operators, appropriate public interest groups, and other interested individuals from the private sector." The FCC would provide staff and resources for the advisory committee.

2. 47 U.S.C., sec. 303(w).

3. Letter from Senator John McCain to Robert Wright, President and CEO of the National Broadcasting Company, 29 Sept. 1997.

4. Paul Farhi, "TV Ratings Agreement Reached," *The Washington Post*, 10 July 1997, A1.

5. See Implementation of sec. 551 of the *Telecommunications Act of 1996*, Video Program Ratings, FCC 98–35 (released 13 March 1998); Implementation of Sections 551(c), (d), and (e) of the *Telecommunications Act of 1996*, Technical Requirements to Enable Blocking of Video Programming Based on Program Ratings FCC 98–36 (released 13 March 1998).

6. Garry Abrams, "Censor Chip?" *California Law Business*, 18 Mar. 1996, 20, 21.

7 See generally, Robert Corn-Revere, "Television Violence and the Limits of Voluntarism," *Yale Journal on Regulation* 12 (Winter 1995): 187.

8 *Community Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1116 (D.C. Cir. 1978) (en banc).

9 *Anti-Defamation League of B'nai B'rith, South Pacific Southwest Regional Office v. FCC*, 403 F.2d 169, 172 (D.C. Cir. 1967), cert. denied, 394 U.S. 30 (1969).

10 *Report on the Broadcast of Violent, Indecent, and Obscene Material*, 51 F.C.C. 2d 418, 420 (1975).

11 *Writers Guild of America, West v. FCC*, 423 F. Supp. 1064, 1098, 1105, 1117 (C.D. Cal. 1976), vacated and remanded on jurisdictional grounds sub nom. *Writers Guild of America, West v. ABC*, 609 F.2d 355 (9th Cir. 1979), cert. denied, 449 U.S. 824 (1980).

12 *Writers Guild of America, West v. FCC*, 1151.

13 *Writers Guild of America, West v. FCC*, 1142.

14 *Writers Guild of America, West v. ABC, Inc.*, 609 F.2d at 365.

15 *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 354 (D.C. Cir. 1998). The court noted that "[a]ny real content-based definition of the term may well give rise to enormous tensions with the First Amendment."

16 *Policy and Rules Concerning Children's Television Programming*, 11 FCC Rcd. 10661, 10677, 10681 (1996) (*"Children's Television Order"*).

17 *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 116 S.Ct. 2374, 2386 (1996).

18 *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 13 FCC Rcd. 1034, para. 103 (1998). See Ken Robinson, *Telecommunications Policy Review*, 8 Sept. 1996, 3.

19 Eli Noam, "Public Interest Programming by American Commercial Television," 39 (paper presented at the Future of Public TV conference, New York City, 6 March 1998). The study examined the growth of public interest programming available on cable television systems in New York City between 1969 and 1997. See "Role of Commercial TV in Public Interest Programming Hotly Debated," *Communications Daily*, 9 March 1998.

20 Noam, "Public Interest Programming," 1.

21 Noam, "Public Interest Programming," 44.

22 Noam, "Public Interest Programming," 41.

23 Noam, "Public Interest Programming," 43.

24 Noam, "Public Interest Programming," 42–43. Noam acknowledged that increased competition had led some news magazines to focus on more sensational subjects, particularly among syndicated "tabloid" shows, but found that this "pales in comparison" to the growth of serious news magazine programs on the networks.

25 The study measured broadcast time (discounted for commercials) devoted to newscasts, informational programs (exclusive of tabloid and talk shows), public affairs, and educational and religious programs in various markets during selected weeks in the period from November 1997 through January 1998. The total amount of such "public interest" programming in the seventeen markets was: Dallas-Ft. Worth (32 percent); Houston (26 percent); Seattle-Tacoma (27.1 percent); Sacramento (25.2 percent); St. Louis (25.8 percent); Portland, Ore. (26.4 percent); Charlotte, N.C. (27.7 percent); San Antonio (22.4 percent); Hampton-Norfolk, Va. (25.7 percent); New Orleans (26.4 percent); Santa Fe-Albuquerque (23.4 percent); Louisville, Ky. (23.6 percent); Boise, Idaho (24.4 percent); Honolulu (19.9 percent); Spokane (24.1 percent); Tucson (22.6 percent); and Tulsa (24.9 percent). When commercial time during public interest programming is counted as well, the total amount of time devoted to such programming increases by approximately 24 percent. See A. H. Belo Corp., *Non-Entertainment Programming Study* (1998).

26 See NAB, *Bringing Community Service Home: A National Report on the Broadcast Industry's Community Service*, April 1998.

27 *Children's Television Order*, 10677, 10679. Proponents of the rules often asserted that the amounts of programming devoted to education were inflated by outlandish claims regarding the instructional value of such programming as *The Flintstones* or *The Jetsons*. Such anecdotes were frequently repeated but never quantified. Moreover, broadcasters might be forgiven for some confusion in implementing the new requirements because Congress, in the legislative history of the *Children's Television Act*, listed shows such as *The Smurfs* and *Pee Wee's Playhouse* as programming that met the law's broad criteria for educational and informational programs. See *Children's Television Act of 1989*, S. Rep. No. 227, 101st Cong., 1st Sess. 7–8 (1989).

28. *Children's Television Order*, 10678.

29. *Children's Television Order*, 10676.

30. See *Chisholm v. FCC*, 538 F.2d 349 (D.C. Cir.), cert. denied, 429 U.S. 890 (1976).

31. *Chisholm v. FCC*; also see Henry Geller, 95 F.C.C.2d 1236 (1983), aff'd sub nom. *League of Women Voters v. FCC*, 731 F.2d 995 (D.C. Cir. 1984).

32. *In re Requests of Fox Broad. Co., Pub. Broad. Serv., & Capital Cities/ABC, Inc.*, 11 FCC Rcd. 11, 101 (1996).

33. *Arkansas Educational Television Commission v. Forbes*, 118 S.Ct. 1633, 1643 (1998) (Such a result "does not promote speech but represses it.")

34. Thomas W. Hazlett, "Market Failure as a Justification to Regulate Broadcast Communications," in *Rationales and Rationalizations*, ed. by Robert Corn-Revere (Washington, D.C.: Media Institute, 1997), 165. See also Thomas W. Hazlett and David W. Sosa, "Was the Fairness Doctrine a 'Chilling Effect'? Evidence from the Postregulation Radio Market," *Journal of Legal Studies* 26 (January 1997): 307.

35. Hazlett, "Market Failure as a Justification," 165.

36. Cass Sunstein, "The First Amendment in Cyberspace," *Yale Law Journal* 104 (May 1995): 1757, 1785–1786.

37. Claudia Puig, "FCC Chief Wants Talk Radio Shows to Deal in 'True Facts,'" Gannett News Service, 25 Sept. 1994 (radio wire).

38 Reed Hundt, "Not So Fast," speech by the FCC chairman at the Museum of Television and Radio, New York City, 3 June 1997.

39 James H. Quello, "Reeding the First Amendment—A Disagreement," remarks by the commissioner before the Florida Association of Broadcasters, 26 June 1997. ("I see the Bill of Rights as a limitation upon government action; the Chairman sees it as a regulatory mission statement.") Such regulatory questions were explored in detail by the Commission when it decided to eliminate the fairness doctrine. See *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990).

40 See Robert Post, "Equality and Autonomy in First Amendment Jurisprudence," *Michigan Law Review* 95 (1997): 1517, 1538. ("To cast the state as teacher is to permit the state to define the agenda and parameters of public debate; it is to presuppose an Archimedean point that stands outside of the processes of self-determination.") Despite its inability to pinpoint how much educational programming existed in the marketplace, the FCC's rules were premised on the assumption that there is "an underprovision of children's educational and informational television programming." *Children's Television Order*, 11 FCC Rcd., para. 34.

41 Thomas G. Krattenmaker and L. A. Powe, Jr., "Converging First Amendment Principles for Converging Communications Media," *Yale Law Journal* 104 (May 1995): 1719, 1725–1726.

42 Sunstein, "The First Amendment in Cyberspace," 1788. See also Owen Fiss, *Liberalism Divided: Freedom of Speech and the Many Uses of State Power* (Boulder: Westview Press, 1996), 21. ("[T]he approach I am advocating is not concerned with the speaker's autonomy, real or effective, but with the quality of public debate.")

43 Sunstein, "The First Amendment in Cyberspace," 1788. Sunstein has written that "[p]references that have adapted to an objectionable system cannot justify that system." Sunstein, *The Partial Constitution* (Cambridge: Harvard University Press, 1993), 221.

44 Sunstein, "The First Amendment in Cyberspace," 1790.

45 Sunstein, *The Partial Constitution*, 221.

46 *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("*Barnette*").

47 *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y.), aff'd, 326 U.S. 1 (1945).

48 *Rowan v. United States Post Office Dept.*, 397 U.S. 728, 738 (1970).

49 *Barnette*, 638.

50 See, e.g., Fiss, *Liberalism Divided*, 40. ("To be a consumer, even a sovereign one, is not to be a citizen.")

51 Sunstein, "The First Amendment in Cyberspace," 1790.

52 Sunstein, "The First Amendment in Cyberspace," 1787–1792.

53 Fiss, *Liberalism Divided*, 30. This statement directly confronts the Supreme Court's admonition in *Buckley v. Valeo*, 424 U.S. 1, 49 (1976), that such preferential treatment is "wholly foreign" to the First Amendment.

54 Sunstein, "The First Amendment in Cyberspace," 1780. ("[S]peech should not be treated as a simple commodity, especially in a period dominated by attention to sensationalistic scandals and low-quality fare.")

55 Max Lerner, "Some Reflections on The First Amendment in the Age of Paratroopers," *Texas Law Review* 68 (1990): 1127, 1134–35.

56 Alexander Meiklejohn, "The First Amendment is an Absolute," 1961 *Sup. Ct. Rev.* 245, 262.

57 Meiklejohn, "The First Amendment is an Absolute."

58 Sunstein, "The First Amendment in Cyberspace," 1780, n. 98. ("Perhaps those interested in Madisonian goals should focus on the entirety of the free speech market, seeing magazines, broadcasting, and even books as aspects of a single market, to be taken as a whole.")

59 Meiklejohn, "The First Amendment is an Absolute," 262.

60 *Barnette*, 637. See Post, "Equality and Autonomy in First Amendment Jurisprudence," 1540. (Such an approach "necessarily puts the state in the position of dictating to the people the outcome of their public deliberations.")

61 Sunstein, "The First Amendment in Cyberspace," 1786. See also 1788. ("A democratic citizenry armed with a constitutional guarantee of free speech need not see consumer sovereignty as its fundamental aspiration.")

62 Krattenmaker and Powe, "Converging First Amendment Principles," 1732. See Post, "Equality and Autonomy in First Amendment Jurisprudence," 1539. ("Certainly it is compatible with the free speech tradition for the state to act positively to subsidize and thereby to supplement and improve public discourse.") See also Rodney A. Smolla, "The Culture of Regulation," *CommLaw Conspectus* 5 (Summer 1997): 193, 202. Other theorists have suggested that the government could "subsidize those broadcasters whose programming it prefers, even if any such preference embodies content discrimination" (Sunstein, "The First Amendment in Cyberspace," 1798). See also Fiss, *Liberalism Divided*, 103. (Government must set the agenda for public discourse by making decisions "analogous to the judgments made by the great teachers of the universities of this nation.")

63 See generally, "The Future of Public Broadcasting," *Comint* 3 (Fall 1992): 1–32; Charles S. Clark, "Public Broadcasting," *The CQ Researcher*, 18 Sept. 1992, 812–814, 820–824.

64 Charles S. Clark, "Public Broadcasting," 822.

65 Charles S. Clark, "Public Broadcasting," 820.

66 Erwin G. Krasnow, Lawrence D. Longley, and Herbert A. Terry, *The Politics of Broadcast Regulation* 3d ed. (1982), 71.

67. Lucas A. Powe, Jr., *American Broadcasting and the First Amendment* (1987), 129. The concern ultimately led to President Nixon's veto of the public broadcasting authorization bill in June 1972. Buchanan, by all accounts, was characteristically blunt about the administration's intent. He reportedly told a public broadcasting executive at a cocktail party, "If you don't do the kind of programming we want, you won't get a fucking dime."

68. E.g., *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984); and *Community-Service Broadcasting of Mid-America v. FCC*, 593 F.2d 1102 (D.C. Cir. 1978) (en banc). See also *Accuracy in Media v. FCC*, 521 F.2d 288, 291 (D.C. Cir. 1975) cert. denied, 425 U.S. 934 (1976). Compare to *Turner Broadcasting System v. FCC*, 114 S.Ct. at 2464, in which the government is foreclosed from using its financial support to gain leverage over any programming decisions. But see *Finley v. National Endowment for the Arts*, 118 S.Ct. 2168 (1998), which found that the government may require some additional non-dispositive criteria for issuing competitive grants for art.

On Hooks and Ladders

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I want to suggest a game called "Hooks and Ladders" to help understand the constitutional issues involved in regulating the media. The game is a labeling game. There are *hooks*, namely the legal bases by which various media have been described and the characteristics imputed them to permit regulation. Then there are *ladders*, or the societal justifications for the actual imposition of regulation.

"Scarcity" is a hook. "Enriching the public debate" is a ladder.

"Pervasiveness" is a hook. "Protecting our children from indecent programming" is a ladder.

The purpose of this short paper is to separate out hooks and ladders, constitutional prerequisites from social justifications. More important, the purpose is not to say whether *Red Lion* (*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 [1969], the decision on which the "scarcity doctrine" is based) is right or wrong, but rather to: (a) understand what function "scarcity" played in permitting regulation (why we relied on that hook); (b) suggest the kinds of constitutionally interesting alternative justifications (ladders) that might be beneath the surface; and (c) place all this in a slightly international perspective.

The argument could be stated as follows: The existence of the "scarcity" basis for regulating the electronic media was—and remains—a wonderful convenience. It was never (here I am indulging in some hyperbole) the *real* reason for restrictions, but was a seemingly neutral justification and one that sounded plausible. As the doctrine of "scarcity" becomes more and more the subject of attack, even ridicule and contempt, it is important to see what functions the doctrine played, what rationales it masked, and what is likely to emerge in its absence.

One could look at Justice Breyer's view in *Denver Area* (*Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 116 S.Ct. 2374 [1986]) essentially as an effort to move the debate from hooks to ladders, from the jurisprudence of categories to a focus on social context.

Another way to put the point is as follows: much of the debate is over what the real world is like. What are the factual premises that underlie constitutional justification? How do we know whether something is "scarce" or whether children are "harmed" or whether television is actually peculiarly "invasive"? Because facts are often taken to be true when there is alarmingly little basis for doing so (or because some institutions are privileged to *make* something true by saying it's true), legal justifications that are founded on such facts are likely to be soft and imperfect themselves.

THE FUNCTIONS OF THE SCARCITY DOCTRINE

Perhaps the economists (or some of them) are right when they say that "scarcity" either never exists or, in some meaningless form, always exists. At any rate, the scarcity basis for constitutional regulation of broadcasting has had a relatively long life. Why has that been the case? What functions does the scarcity doctrine perform?

1. ***Red Lion v. Tornillo.*** The doctrine, as it was developed, famously allowed judges to distinguish between the world of *Red Lion* and the world of *Tornillo* (*Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 [1974]), between electronic media and newspapers, between radio and television on the one hand and newspapers on the other.

This was a special gift of the scarcity doctrine, as it came to be understood. It was a gift because the doctrine provided the idea of a bright line between media that seemed very different intuitively. Television and radio seemed so much an entertainment medium, so different historically from newspapers in their patterns of use and enjoyment. It would be hard to turn these differences into constitutional doctrine, but to an average citizen (and to the industry for its first fifty years), the distinction seemed compelling. After all, why else were these new guys licensed, and why else did they have to go through an elaborate process of saying what they were going to do? Clearly they were different.

There was another advantage: the doctrine placed the powerful and relatively independent newspapers on the nonregulatory side of the line and, again, for the first fifty years of radio regulation, the newspapers probably did not complain too much.

2. **A temporary measure**. The scarcity doctrine was useful because it had or has the illusion of temporariness. It suggested that regulation is justified only as long as there is scarcity. Scarcity is curable. And it contained the promise that is now coming to be fulfilled (or to haunt): that regulation will disappear when scarcity does. Radio will become like newspapers. To the extent that "scarcity" was not really the rock-bottom reason for regulation or justification for regulation, that promise is deceptive.

3. **An easy out**. The scarcity doctrine was especially comforting, because it allowed avoidance of the very hardest questions, the very questions that are facing policymakers today. How do you secure a ladder when you're not sure about the hooks? What was it about the relationship between media and society that permits or requires government to intervene (and in a way that is consistent with the First Amendment)?

RETAINING THE SCARCITY DOCTRINE AND SEARCHING FOR OTHER HOOKS

Because of its important functions, inevitably, there are and will be efforts to redefine "scarcity" and shore up the doctrine, adapting it to new technologies.

1. ***Turner I***. In this case (*Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 [1994]), the Supreme Court developed a "bottleneck" approach that suggests that cable television is susceptible to some forms of regulation that are related to scarcity (though in a different guise).

2. ***Turner II***. Scarcity might be redefined in terms of patterns of dominance: what is scarce is not spectrum, but preferred channels in terms of reaching audience. In *Turner II* (*Turner Broadcasting System v. FCC*, 520 U.S. 180 [1997]), Justice

Kennedy talks about the anticompetitive function of must-carry rules. Somewhere, there's a relationship between old ideas of scarcity and new ones that look at industry structure. This is not technological scarcity, but economic power. Of course, here, it may be more difficult to distinguish broadcasting from other media.

3. ***Reno***. The other hooks defined in *Reno* (*Reno v. ACLU*, 117 S.Ct. 2329 [1997]) are, of course, "pervasiveness" and "history of regulation." Probably "frequency as government property" is a hook. "Public forum" may also be a hook (historically devoted to common purposes).

THE ABYSS ON THE OTHER SIDE OF SCARCITY: LOOKING ONLY AT LADDERS

If scarcity diminishes as the characteristic and principal mode of justifying government intervention, what will stand in its place? Or, what has always been there, beneath the surface, beneath this convenient justification?

1. ***Pacifica* and the power of the medium**. Quite well known are the arguments developed in *Pacifica* (*FCC v. Pacifica Foundation*, 438 U.S. 726 [1978]) about broadcasting's invasiveness and unique availability to children, in a sense, about the power of the medium. Perhaps this is a ladder, a social need to regulate rather than a constitutional basis for regulation.

It is for this reason that pervasiveness, or unique accessibility, is such a potent justification that it bears its own critique. Beyond the facts of *Pacifica* itself, there is a view that pictures inhabit a different constitutional domain from print or speech. Certainly, world history treats images as having a magical sway that is different from that of the printed word. This is not the usual explanation of *Pacifica*, but it lies somewhere at its heart even though it is a radio case.

2. **Children and public health**. If one looks back at the history of regulation and federal intervention, quackery and public health was there from the beginning. One could say—tobacco is among the most sophisticated examples here—that what is changing is our notion of public health (including mental health and the men-

tal health of children). Notions of deception, notions of protection, notions of impact—all these are changing and generally expanding. The question, rarely asked, is whether public health is the new mode of justifying regulation. (The V-chip debate could be said to be really about public health.)

The limits here involve our knowledge base (what I referred to above as the facts about the real world that underlie constitutional doctrine). The tobacco wars are about this question, in part. So are the indecency battles.

At the heart of the point of view of the Religious Right, the Moral Majority, and others is a broader notion of what constitutes public health and a greater confidence in the relationship between certain kinds of programming and the public health of children.

3. **The architecture of the electoral process or the public sphere**. There is some embedded power in the state legislatures and in the federal government to establish the machinery of elections—the infrastructure of our system. Some aspects of this problem are obvious, such as establishment of the prerequisites for candidacy, including number of signatures to get on a ballot, age, residence, etc. Almost wholly unexplored is the extent to which, and tools by which, ideas of electoral architecture can be associated with regulation of the press. It is quite interesting that much of the assistance given by U.S. entities to transitional societies (e.g., the post-Soviet countries) is very careful and thorough in terms of how broadcasting time is made available to political candidates.

Obviously, this issue is deeply involved in much more than the regulation of rates and access by political candidates to licensed radio and television broadcasters. I wouldn't want to make too much of the constitutionality of restrictions on campaigning within fifty yards of a polling booth, but it's worth trying to consider a jurisprudence of democratic election administration that has nothing to do with scarcity.

Related to this issue is the increasingly ubiquitous discussion of the "public sphere." Assuming that an active public sphere is necessary for the development of a healthy democratic society, the question is whether state regulation or intervention can provide the conditions for the existence of such a sphere. Morsels of American policy such as the public access doctrine seem addressed at this notion of a public sphere.

Among the questions—which cut across all elements of the media—are: timing of endorsements, limits on advertising, truthfulness in advertising, objectivity in covering candidates, and relationship to debates.

NATIONAL IDENTITY

Here's a puzzling question. Almost all countries—including Western democracies—think that issues of national identity justify regulation. It is commonly thought that this is not the case in the United States and should not be. It is worth examining this distinction.

First, there are some strains of national identity regulation in the United States. Section 310 of the Communications Act of 1934 limits the extent of foreign ownership of broadcast licenses issued by the Federal Communications Commission (FCC). Currently, there is even a debate over whether a direct broadcast satellite (DBS) provider must comply with the requirements of Section 310.

Second, the United States has not really been tested. We have not, in the television broadcast era, been under any sort of assault, or perceived ourselves to be under any ideological external assault that had the purpose or impact of weakening our national identity. At such times when we have perceived ourselves as under attack (as in the period after World War I and in the 1950s), in fact, formal and informal regulatory influences on the media were promptly enacted or less formally put into place.

Third, I would argue that we *are* undergoing a bit of a national identity crisis, but we lump it under the rubric of sex and violence. We can't blame it—as the Canadians and French and others do—on "the United States," but we *can* blame it on "Hollywood." If one put advocates for the Communications Decency Act and "national identity" in the same room, they might agree on 80 percent of content they would want limited.

REGULATION AND THE PUBLIC INTEREST IN A GLOBAL COMMUNITY

For the last fifty years, the United States has been thought to be particularistic—one might say idiosyncratic—in terms of the shape and justification of media regulation, even with respect to regulation of the electronic media. The idea is that the United States is differentiated by the First Amendment and the interpretations that have developed around it.

Here, I want to make two points. The first point, looking backward, is that notwithstanding its rhetoric and constitutional framework, the U.S. approach has not been so different from that of other Western democracies. The legal analysis, the existence of the Constitution, the nature of the regulatory agency, the role of the courts—all these may be different from the U.K. or French or German framework. But at bottom (and this is a hypothesis subject to criticism), the results have been not too dissimilar. If anything, our programming may be more censored (for sexual content), than that of our continental counterparts. The main exception has to do with politics and the electoral system. European counterparts are far more subject to regulation in terms of political advertising and endorsements than are the U.S. licensees.

The second point is forward-looking. In a world where program producers are seeking a more extensive, more global market, private arrangements will tend to flatten out regulatory differences. In this global environment, the private players will more greatly value opportunities for entry than freedom from content restrictions.

Two trends ought to be taken into account by the President's Advisory Committee on the Public Interest Obligations of Digital Broadcasters and other policymakers:

1. Increasingly, arrangements for media regulation will be worked out multilaterally, or, at the least, consultation will exist, say between the FCC and others in the United States and bodies in the European Union and elsewhere.

2. For reasons of efficiency, private multinationals, which operate in many markets, will seek program approaches that are as

transportable as possible; conversely, it will be in the interest of these private multinationals to have world regulatory patterns emerge that are as standardized as possible.

CONCLUSION

This article suggests that it is important to think about the distinction between what I've called the hooks and the ladders of constitutional doctrine relating to regulation of speech and the press. Are both hooks and ladders necessary? Do hooks of this sort exist only to support ladders? Is American constitutional doctrine, which may have been hook-oriented with respect to electronic media, in the process of shifting to ladders?

Red Lion and the Constitutionality of Regulation: A Conversation Among the Justices

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It's a national sport to hold a mirror to the lips of *Red Lion*. So is the race to find a replacement for "scarcity" as a constitutional basis for media regulation. This little paper is an unusual effort to extend this sport through a very slightly edited text of what various Justices have said about scarcity and its substitutes.[1]

Let's think of this as a roundtable, a little seminar created and conducted especially for the benefit of those confused by Supreme Court opinions.

Chief Justice William Rehnquist is, naturally, in the Chair. To make him a good and prodding moderator, I have invented his words, as ought to be pretty clear (except where otherwise indicated). I hope the liberties I have taken with his *persona* will be taken in the spirit of making the discourse more interesting.

The main discussants at this table are Justice Anthony Kennedy, who thought he'd more or less killed *Red Lion* in the first *Turner Broadcasting* case, and Justice Clarence Thomas, who has emerged as the most articulate and firmest believer in the death of *Red Lion*. On the other side, if it can be called that, are Justices Stephen Breyer and David Souter, who tried to resuscitate *Red Lion* (and to some extent succeeded) in the last two terms through the *Denver Area* case and the second *Turner* case. Justice John Paul Stevens is at the table as well because of his opinion in the Internet case, *Reno v. ACLU*, and his support of Justice Breyer in *Denver Area*. And Justice Sandra Day O'Connor chimes in as well, largely through her recent comments in the *Reno* and *Turner II* cases. Mostly, I have *not* made up the words of the distinguished discussants in this roundtable. The dialogue that follows has been assembled from texts of the various Justices' actual opinions about these questions. (I have very lightly edited the resulting text, adding a few conversational transitions and removing many of the case citations to make the discussion move more quickly.)

PART I

Chief Justice Rehnquist: *I have brought you together in our handsome conference room for a special session of the Justices held for the particular benefit of the President's Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters.*

My fellow Brethren, these poor chaps have to determine, from the history of our decisions and opinions, what constitutional basis there might be for Congress to legislate broadcasting in light of the First Amendment. Many professors, representatives of industry groups, and others are trying to persuade them as to what the Constitution really means on this topic. Since we are the true experts on this question, I have agreed, just this once, to let them into our inner sanctum.

Justice Thomas, why don't you start by spelling out, very briefly, the early history of Red Lion, *decided in 1969, and our own pattern of distinguishing broadcasting from newspapers.*

Justice Thomas: The text of the First Amendment makes no distinction between print, broadcast, and cable media, but we have done so. In *Red Lion Broadcasting Co. v. FCC,* we held that, in light of the scarcity of broadcasting frequencies, the government may require a broadcast licensee "to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves." We thus endowed the public with a right of access "to social, political, esthetic, moral, and other ideas and experiences." That public right left broadcasters with substantial, but not complete, First Amendment protection of their editorial discretion.

In contrast, we have not permitted that level of government interference in the context of the print media. In *Miami Herald Publishing Co. v. Tornillo,* for instance, we invalidated a Florida statute that required newspapers to allow, free of charge, a right of reply to political candidates whose personal or professional character the paper assailed. We rejected the claim that the statute was constitutional because it fostered speech rather than restricted it, as well as a related claim that the newspaper could permissibly be made to serve as a public forum. We also flatly rejected the argument that the newspaper's alleged media monopoly could justify forcing the paper to speak in contravention of its own editorial discretion.

Chief Justice Rehnquist: *Thanks for the background, Justice Thomas. You put the law very clearly. But it's your view—is it not?--that* Red Lion *is, or ought to be, dead as a doornail. Why don't you tell us of its demise, drawing from your dissent in the* Denver Area *case.*

Justice Thomas: Our First Amendment distinctions between media, dubious from their infancy, placed cable in a doctrinal wasteland in which regulators and cable operators alike could not be sure whether cable was entitled to the substantial First Amendment protections afforded the print media or was subject to the more onerous obligations shouldered by the broadcast media.[2] Over time, however, we have drawn closer to recognizing that cable operators should enjoy the same First Amendment rights as the nonbroadcast media.

Chief Justice Rehnquist: *We had a bunch of early decisions involving cable television and its regulation in which we hardly touched free speech claims. What about those cases? Did we suddenly see the light?*

Justice Thomas: Our first ventures into the world of cable regulation involved no claims arising under the First Amendment, and we addressed only the Federal Communications Commission's (FCC's) regulatory authority over cable operators.[3] Only in later cases did we begin to address the level of First Amendment protection applicable to cable operators. In *Preferred Communications,* for instance, when a cable operator challenged the City of Los Angeles's auction process for a single cable franchise. . . . we noted that cable operators communicate various topics "through original programming or by exercising editorial discretion over which stations or programs to include in [their] repertoire." But we then likened the operators' First Amendment interests to those of broadcasters subject to *Red Lion's* right of access requirement.

Five years later, in *Leathers v. Medlock*,[4] we dropped any reference to the relaxed scrutiny permitted by *Red Lion*. Arkansas had subjected cable operators to the state's general sales tax, while continuing to exempt newspapers, magazines, and scrambled satellite broadcast television. Cable operators, among others, challenged the tax on First Amendment grounds, arguing that the state could not discriminatorily apply the tax to some, but not all, members of the press. Though we ultimately upheld the tax scheme because it was not content-based, we agreed with the operators that they enjoyed the protection of the First Amendment. We found that cable operators engage in speech by providing news, information, and entertainment to their subscribers and that they are "part of the 'press.'"

Chief Justice Rehnquist: *Okay, that's the lead up. Now drop the hammer. Tell them about how the majority got fed up with dancing around this issue and tried to bury* Red Lion *in the case we call* Turner I, *the first "must-carry" case.*

Justice Thomas: Two terms ago, in *Turner Broadcasting System, Inc. v. FCC*, we stated expressly [that] the *Red Lion* standard does not apply to cable television. As we said there, "[t]he rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation . . . does not apply in the context of cable regulation," and "[a]pplication of the more relaxed standard of scrutiny adopted in *Red Lion* and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation."[5]

Chief Justice Rehnquist: *Justice Kennedy, you went further than that, didn't you?. Why don't you tell us in your own words how you set* Red Lion *up so as to discredit it?*

Justice Kennedy: First, in *Turner I*, I gave a very specific reading to *Red Lion*. Here's what I said:

> The justification for our distinct approach to broadcast regulation rests upon the unique physical limitations of the broadcast medium. As a general matter, there are more would-be broadcasters than frequencies available in the electromagnetic spectrum. And if two broadcasters were to attempt to transmit over the same frequency in the same locale, they would interfere with one another's signals, so that neither could be heard at all. The scarcity of broadcast frequencies thus required the establishment of some regulatory mechanism to divide the electromagnetic spectrum and assign specific frequencies to particular broadcasters. See *FCC v. League of Women Voters* ("The fundamental distinguishing characteristic of the new medium of broadcasting . . . is that broadcast frequencies are a scarce resource [that] must be portioned out among applicants").[6]

In addition, the inherent physical limitation on the number of speakers who may use the broadcast medium has been thought to require some adjustment in traditional First Amendment analysis to permit the government to place limited content restraints, and impose certain affirmative obligations, on broadcast licensees. As we said in *Red Lion*, "where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."

Chief Justice Rehnquist: *Didn't you then use the gentle rebuke that "courts and commentators have criticized the scarcity rationale since its inception," and language which is a frequent signal to observers of our disappointment with existing doctrine: "We have declined to question its continuing validity as support for our broadcast jurisprudence, see* FCC v. League of Women Voters, *and see no reason to do so here."*

That was deftly done. I recognize the placement of the fingerprints. Then, given how you characterized Red Lion, *how did you determine that the doctrine did not apply to the new technologies?*

Justice Kennedy: The broadcast cases are inapposite to cable . . . because cable television does not suffer from the inherent limitations that characterize the broadcast medium. Indeed, given the rapid advances in fiber optics and digital compression technology, soon there may be no practical limitation on the number of speakers who may use the cable medium. Nor is there any danger of physical interference between two cable speakers attempting to share the same channel. In light of these fundamental technological differences between broadcast and cable transmission, application of the more relaxed standard of scrutiny adopted in *Red Lion* and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation.

Chief Justice Rehnquist: *That's pretty interesting. I guess you could infer that "the rapid advances" idea also applies to digital broadcasting. Yet, I know the government harbors a love for* Red Lion. *Did the Solicitor General try to get you to apply it to cable, in* Turner I, *even absent scarcity?*

Justice Kennedy: You bet.

Although the government acknowledged the substantial technological differences between broadcast and cable, it advanced a second argument (second to scarcity) for application of the *Red Lion* framework to cable regulation. It asserted that the foundation of our broadcast jurisprudence is not the physical limitations of the electromagnetic spectrum, but rather the "market dysfunction" that characterizes the broadcast market.

Because the cable market is beset by a similar dysfunction, the government maintained, the *Red Lion* standard of review should also apply to cable. While I finally agreed that the cable market suffers certain structural impediments, I found the government's argument flawed in two respects. First, as discussed above, the special physical characteristics of broadcast transmission, not the economic characteristics of the broadcast market, are what underlies our broadcast jurisprudence. Second, the mere assertion of dysfunction or failure in a speech market, without more, is not sufficient to shield a speech regulation from the First Amendment standards applicable to nonbroadcast media.

Chief Justice Rehnquist: *So, as I understand it, you were rejecting the relaxed standard of* Red Lion, *on any basis. Let's see how this played through later decisions.*

Justice Breyer, it's your turn. You've come on to the Court as a highly touted expert on regulation and communications policy. You were one of the young hotshots long ago on the President's (that was President Johnson) Telecommunications Task Force in 1967.

Here, in the last couple of years, you've begun to assert your own view on these questions of regulating the electronic media. I see you as trying to lead the Court out of what you think is its constitutional wilderness on these questions.

In the second Turner *case, decided just this term, you went out of your way to differ from Justice Kennedy. You voted with the Court to uphold the must-carry rules, but you did so by proclaiming a wholly different interpretation of* Red Lion *and its applicability.*

Rather than distinguish Red Lion, *you embraced it and redefined it as not about scarcity but about public discourse. Can we have a few of your choice words about that?*

Justice Breyer: I joined Justice Kennedy's opinion in *Turner II*, except where he tried to pin the must-carry rules on an anticompetitive rationale.

Chief Justice Rehnquist: *I remember. Justice Kennedy wanted to find a way to uphold the must-carry rules without relying on the* Red Lion *rationale that "scarcity" permitted a lower form of scrutiny.*

Justice Breyer: I agreed with the majority that the must-carry statute must be "sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." My support rested, however, not upon the principal opinion's analysis of the statute's efforts to "promote fair competition," but rather upon its discussion of the statute's other objectives, namely "(1) preserving the benefits of free, over-the-air local broadcast television," and "(2) promoting the widespread dissemination of information from a multiplicity of sources."

Chief Justice Rehnquist: *Why is that distinction important?*

Justice Breyer: Whether or not the must-carry statute does or does not sensibly compensate for some significant market defect, it undoubtedly seeks to provide over-the-air viewers who lack cable with a rich mix of over-the-air programming by guaranteeing the over-the-air stations that provide such programming the extra dollars that an additional cable audience will generate. I believe that this purpose—to assure the over-the-air public "access to a multiplicity of information sources,"—provides sufficient basis for rejecting the First Amendment claim that the statute is unconstitutional.

Chief Justice Rehnquist: *This sounds like you are back to something like* Red Lion's *emphasis on the "rights of the viewer." Are you trying to balance the rights of the over-the-air viewer against the rights of the cable operator (regardless of the scarcity argument)?*

Justice Breyer: I do not deny that the compulsory carriage that creates the "guarantee" extracts a serious First Amendment price. It interferes with the protected interests of the cable operators to choose their own programming; it prevents displaced cable program providers from obtaining an audience; and it will sometimes prevent some cable viewers from watching what, in its absence, would have been their preferred set of programs. This "price" amounts to a "suppression of speech."

Chief Justice Rehnquist: *That's pretty candid. Shouldn't it be enough, then, that we are depriving these cable program providers and cable viewers and operators of speech rights?*

Justice Breyer: There are important First Amendment interests on the other side as well. The statute's basic noneconomic purpose is to prevent too precipitous a decline in the quality and quantity of programming choice for an ever-shrinking non-cable-subscribing segment of the public.

This purpose reflects what "has long been a basic tenet of national communications policy," namely that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." That policy, in turn, seeks to facilitate the public discussion and informed deliberation, which, as Justice Brandeis pointed out many years ago, democratic government presupposes and the First Amendment seeks to achieve. Indeed, *Turner I* rested in part upon the proposition that "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."

Chief Justice Rehnquist: *Given all of this, what's the bottom line for the Advisory Committee? What's the First Amendment rule in determining whether a condition or regulation can be permitted?*

Justice Breyer: With important First Amendment interests on both sides of the equation, the key question becomes one of proper fit. That question, in my view, requires a reviewing court to determine both whether there are significantly less restrictive ways to achieve Congress' over-the-air programming objectives, and also to decide whether the statute, in its effort to achieve those objectives, strikes a reasonable balance between potentially speech-restricting and speech-enhancing consequences.

Chief Justice Rehnquist: *Let's see some examples of balancing. I always like circus acts.*

Justice Breyer: In particular, I note (and agree) that a cable system, physically dependent upon the availability of space along city streets, at present (perhaps less in the future) typically faces little competition, that it therefore constitutes a kind of bottleneck that controls the range of viewer choice (whether or not it uses any consequent economic power for economically predatory purposes), and that some degree—at least a limited degree—of governmental intervention and control through regulation can prove appropriate when justified under *O'Brien* (at least when not "content based").

I also agree that, without the must-carry statute, cable systems would likely carry significantly fewer over-the-air stations, that station revenues would therefore decline, and that the quality of over-the-air programming on such stations would almost inevitably suffer, I agree further that the burden the statute imposes upon the cable system, potential cable programmers, and cable viewers, is limited and will diminish as typical cable system capacity grows over time.

Finally, I believe that Congress could reasonably conclude that the must-carry statute will help the typical over-the-air viewer (by maintaining an expanded range of choice) more than it will hurt the typical cable subscriber (by restricting cable slots otherwise available for preferred programming). The latter's cable choices are many and varied, and the range of choice is rapidly increasing. The former's over-the-air choice is more restricted; and, as cable becomes more popular, it may well become still more restricted insofar as the over-the-air market shrinks and thereby, by itself, becomes less profitable. In these circumstances, I do not believe the First Amendment dictates a result that favors the cable viewers' interests.

Chief Justice Rehnquist: *I don't want to get overly technical. But how high is the pole over which a statute has to vault? Is this* Red Lion's *"relaxed scrutiny" or* O'Brien's *"intermediate scrutiny."*

Justice Breyer: These and other similar factors discussed by the majority, lead me to agree that the statute survives "intermediate scrutiny," whether or not the statute is properly tailored to Congress's purely economic objectives.

Chief Justice Rehnquist: *If I get it straight, Justice Breyer, you thought it was OK to have must-carry rules on cable because that will lead to a healthier over-the-air sector and that means greater public debate. Justice O'Connor, you look amazingly uncomfortable. I know you objected wildly to Justice Kennedy's and Justice Breyer's analyses.*

Justice O'Connor: In sustaining the must-carry provisions of the Cable Act, the Court, in *Turner II*, ignored the main justification of the statute urged [by the government and the broadcasters and others] and subjected restrictions on expressive activity to an inappropriately lenient level of scrutiny.

The principal opinion then misapplied the analytic framework it chose, exhibiting an extraordinary and unwarranted deference for congressional judgments, a profound fear of delving into complex economic matters, and a willingness to substitute untested assumptions for evidence.

Chief Justice Rehnquist: *That's skewing poor Justice Kennedy, author of the principal opinion in both the* Turner *decisions. He was just trying to keep* Red Lion *interred while sustaining the must-carry rules. Why don't you just stick to attacking Justice Breyer? I think that will be of more use to the Advisory Committee.*

Justice O'Connor: Justice Breyer disavowed the principal opinion's position on anticompetitive behavior, and instead treated the must-carry rules as a "speech-enhancing" measure designed to ensure access to "quality" programming for non-cable households. Neither the principal opinion nor the partial concurrence explains the nature of the alleged threat to the availability of a "multiplicity of broadcast programming sources," if that threat does not arise from cable operators' anticompetitive conduct. Such an approach makes it impossible to discern whether Congress was addressing a problem that is "real, not merely conjectural," and whether must-carry addresses the problem in a "direct and material way."

Chief Justice Rehnquist: *You weren't all negative. What caught my eye in reading your dissent, and what might be interesting to the Advisory Committee, was your suggestion that a subsidy scheme for over-the-air broadcasters could be constitutional even though reserving space for them was not.*

Justice O'Connor: Thanks, Chief. To the extent that Justice Breyer saw must-carry as a "speech-enhancing" measure designed to guarantee over-the-air broadcasters "extra dollars," it is unclear why subsidies would not fully serve that interest.

Chief Justice Rehnquist: *Isn't that impractical? How would you fashion a subsidy?*

Justice O'Connor: If the government is indeed worried that imprecision in allocation of subsidies would prop up stations that would not survive even with cable carriage, then it could tie subsidies to a percentage of stations' advertising revenues (or, for public stations, member contributions), determined by stations' access to viewers. For example, in a broadcast market where 50 percent of television-viewing households subscribe to cable, a broadcaster has access to all households without cable as well as to those households served by cable systems on which the broadcaster has secured carriage. If a broadcaster is carried on cable systems serving only 20 percent of cable households (i.e., 10 percent of all television-viewing households in the broadcast market), the broadcaster has access to 60 percent of the television-viewing households. If the government provided a subsidy to compensate for the loss in advertising revenue or member contributions that a station would sustain by virtue of its failure to reach 40 percent of its potential audience, it could ensure that its allocation would do no more than protect those broadcasters that would survive with full access to television-viewing households.

Chief Justice Rehnquist: *Thanks, Justice O'Connor, for that imaginative suggestion. That sounds more like a statute than an opinion.*

I want to return to Justice Breyer. We've talked about your differences with most of my colleagues by your insistence on Red Lion's *emphasis on rich public discussion and debate. There seems to be (at least) one other major important difference between you and Justice Kennedy. He and Justice Thomas and Justice O'Connor want to have rules that are fairly clear, that can be understood by members of the Advisory Committee.*

If you were in charge, what would you tell the Advisory Committee?

Justice Breyer: The history of this Court's First Amendment jurisprudence is one of continual development, as the Constitution's general command that "Congress shall make no law . . . abridging the freedom of speech, or of the press," has been applied to new circumstances requiring different adaptations of prior principles and precedents. The essence of that protection is that Congress may not regulate speech except in cases of extraordinary need and with the exercise of a degree of care that we have not elsewhere required.[9]

Chief Justice Rehnquist: *Okay, that sounds a little more tentative and much mushier that our careful three-tier tests. It sounds to me, reading your* Denver Area *opinion, that you want to get rid of what we have tried to represent as "bright lines" or "clear categories" and throw the whole thing up for grabs. Frankly, I was amazed in the recent* Denver Area *case, your maiden opinion in the electronic media field, at how you gained a plurality, and almost five votes, for a wholly different way of looking at* Red Lion *and our subsequent cases.*

Can you try, with some economy, to let this Advisory Committee in on your view?

Justice Breyer: Over the years, this Court has restated and refined basic First Amendment principles, adopting them more particularly to the balance of competing interests and the special circumstances of each field of application. For example, *Red Lion Broadcasting Co. v. FCC* employed a highly flexible standard in response to the scarcity problem unique to over-the-air broadcast.[10]

This tradition teaches that the First Amendment embodies an overarching commitment to protect speech from government regulation through close judicial scrutiny, thereby enforcing the Constitution's constraints, but without imposing judicial formulae so rigid that they become a straitjacket that disables government from responding to serious problems. This Court, in different contexts, has consistently held that the government may directly regulate speech to address extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech.

Chief Justice Rehnquist: *I recognize the swipe at our First Amendment jurisprudence. Who are you calling "rigid," and which of our "judicial formulae" are you saying constitutes a "straitjacket?"*

Sorry—I don't want to depart from my role as moderator. Let me take it slower: I suppose you are holding out for a broader standard, one that's more open and does not necessarily adopt one of the specific rules that have been previously articulated by the Court.

For my money, I thought the Court had worked pretty hard at developing very specific constitutional standards for different media. That's where we ask how broadcasting is different from cable and get into the whole scarcity business.

Shouldn't we tell these fine people appointed by the president exactly which rules apply as scarcity vanishes? Is it really enough that the government is "responding to serious problems?" The government always thinks that it is responding to serious problems.

Justice Breyer: I didn't agree with Justices Kennedy and Thomas in *Denver Area* and I wished I'd had a majority to say what should be done in these areas of new technology.

Justices Kennedy and Thomas would have us declare which, among the many applications of the general approach that this Court has developed over the years, we should apply to cable television, for example in the case of indecency on cable leased channels. But no definitive choice among competing analogies (broadcast, common carrier, bookstore) allows us to declare a rigid single standard, good for now and for all future media and purposes.

Chief Justice Rehnquist: *But doesn't that approach leave us—and the Advisory Committee—drifting at sea with no clear rules?*

Justice Breyer: I would not reject all the more specific formulations of the standards—they appropriately cover the vast majority of cases involving government regulation of speech. Rather, aware as we are of the changes taking place in the law, the technology, and the industrial structure, related to telecommunications,[11] I—and the Justices who joined me in the plurality in *Denver Area*—believe it unwise and unnecessary definitively to pick one analogy or one specific set of words now.

Chief Justice Rehnquist: *Taxpayers as well as some of your colleagues may think we're paid to make rules that are useful guides. Some may even say that the First Amendment is stronger if there are clear rules as to when the Constitution applies. I suppose you will make the argument that there's too much change in the air to have clarity now.*

Justice Breyer: I agree with what was said in *Columbia Broadcasting*, namely that "[t]he problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded ten years hence."[12]

I therefore think it premature to answer the broad questions that [many people want answered] in their efforts to find a definitive analogy, deciding, for example, the extent to which private property can be designated a public forum, whether public access channels are a public forum, whether the government's viewpoint-neutral decision to limit a public forum is subject to the same scrutiny as a selective exclusion from a pre-existing public forum, whether exclusion from common carriage must for all purposes be treated like exclusion from a public forum, and whether the interests of the owners of communications media always subordinate the interests of all other users of a medium.

Chief Justice Rehnquist: *Let's get specific, looking, for example, at how you dealt with the Congress's effort, in the 1992 Cable Act, to regulate indecency on leased channels and permit cable operators to exclude it. In* Turner I, *I thought we buried* Red Lion, *so why don't we treat cable like a newspaper? I know what your answer was in* Turner II *(appealing to* Red Lion's *public sphere foundations), but do you have more to say about it than that?*

Justice Breyer: The Court's distinction in *Turner I*, between cable and broadcast television, relied on the inapplicability of the spectrum scarcity problem to cable.

While that distinction was relevant in *Turner*, to the justification for structural regulations at issue there (the "must carry" rules), it has little to do with a case that involves the effects of television viewing on children. Those effects are the result of how parents and children view television programming, and how pervasive and intrusive that programming is. In that respect, cable and broadcast television differ little, if at all.

Chief Justice Rehnquist: *That's pretty amazing. Are you telling me that "scarcity" is sometimes, but not always the way to think about what standard should apply?*

Justice Thomas, help me here!

Justice Thomas: I disagree with Justice Breyer's detailed explanation of why he believes it is "unwise and unnecessary," to choose a standard against which to measure petitioners' First Amendment claims. He largely disregards our attempt in *Turner I* to define that standard. His attempt to distinguish *Turner* on the ground that it did not involve "the effects of television viewing on children," is meaningless because that factual distinction has no bearing on the existence and ordering of the free speech rights asserted in these cases.

Chief Justice Rehnquist: *Now I get the difference, and here's the situation as far as Justice Breyer goes:* Red Lion's *scarcity basis may no longer apply, but—as far as must-carry is concerned,* Red Lion's *public sphere foundation still lives. And if we're dealing with indecency on cable, scarcity isn't the relevant doctrine anyway.*

Maybe Justice Stevens can shed light on this: You've been around for a while. Do you agree with Justice Breyer? Do you agree that it's not the specific medium that's the key, but more the context?

You voted with Justice Breyer in Denver Area, *as did Justice Souter. That's a pretty big chunk of the Court.*

Justice Stevens: Like Justice Breyer and Justice Souter, I am convinced that it would be unwise to take a categorical approach to the resolution of novel First Amendment questions arising in an industry as dynamic as this.

Just as Congress may legitimately limit access to certain cable channels to unaffiliated programmers, I believe it may also limit, within certain reasonable bounds, the extent of the access that it confers upon those programmers.[13] If the government had a reasonable basis for concluding that there were already enough classical musical programs or cartoons being telecast—or, perhaps, even enough political debate—I would find no First Amendment objection to an open access requirement that was extended on an impartial basis to all but those particular subjects. A contrary conclusion would ill-serve First Amendment values by dissuading the government from creating access rights altogether.

Chief Justice Rehnquist: *Justice Souter, you usually are pretty clear about these things yourself.*

Are you really with the crowd that says that this is a time of waiting and watching, of trying to experiment while technology develops? Don't we need rules, especially in the First Amendment area?

Justice Souter: I do not think the fact that we deal, say, with cable transmission necessarily suggests that a simple category subject to a standard level of scrutiny ought to be recognized at this point. While we have found cable television different from broadcast with respect to the factors justifying intrusive access requirements under the rule in *Red Lion*,[14] Justice Breyer's plurality opinion in *Denver Area* rightly observed that the characteristics of broadcast radio that rendered indecency particularly threatening in *Pacifica*,[15] that is, its intrusion into the house and accessibility to children, are also present in the case of cable television.

It would seem, then, that the appropriate category for cable indecency should be as contextually detailed as the *Pacifica* example, and settling upon a definitive level-of-scrutiny rule of review for so complex a category would require a subtle judgment.

Sharply differing with me and Justice Breyer in *Denver Area*, Justice Kennedy stressed the worthy point that First Amendment values generally are well-served by categorizing speech protection according to the respective characters of the expression, its context, and the restriction at issue. Reviewing speech regulations under fairly strict categorical rules keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said.[18]

As a result, he saw no warrant there for anything but a categorical and rule-based approach applying a fixed level of scrutiny, the strictest, to judge the content-based provisions of the statute. He accordingly faulted us for declining to decide the precise doctrinal categories that should govern the issue at hand.

The value of the categorical approach generally to First Amendment security cause me to explain, as I have above, why I joined Justice Breyer's and the Court's unwillingness to announce a definitive categorical analysis in *Denver Area*.

Chief Justice Rehnquist: *This is a double lollapalooza. First, you are saying that "indecency" regulation may have little to do with whether a medium has scarcity characteristics or not. I will surely want to get back to that question, with Justice Stevens, the author of the* Reno *Internet decision.*

But I want to keep with the Red Lion *question. What Justice Thomas was saying, and what I thought was the case, is the following: we have different media and different rules for each one. We then determine whether the basis (like scarcity) for a particular rule still survives in the real world. If it doesn't, then the rule is undermined and we make a new rule. Isn't that what Turner I was all about? And shouldn't we try to find a rule for cable and then one for the Internet? What you did in* Denver Area *seems inconsistent with that mandate.*

Justice Souter: There is even more to be considered, enough more to demand a subtlety tantamount to prescience.

All of the relevant characteristics of cable are presently in a state of technological and regulatory flux. Recent and far-reaching legislation not only affects the technical feasibility of parental control over children's access to undesirable material,[17] but portends fundamental changes in the competitive structure of the industry and, therefore, the ability of individual entities to act as bottlenecks to the free flow of information.[18]

Chief Justice Rehnquist: *Are you arguing for a new jurisprudence at a time of change? Some might call that creative; others might call it irresponsible ducking and a failure to give guidance to good people like those appointed to the Advisory Committee. Maybe another word is needed here from my pal, Justice Thomas.*

Justice Thomas: In the process of deciding not to decide on a governing standard, Justice Breyer [and his friends] purport to discover in our cases an expansive, general principle permitting government to "directly regulate speech to address extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech." This heretofore unknown standard is facially subjective and openly invites balancing of asserted speech interests to a degree not ordinarily permitted. It is true that the standard I endorse lacks the "flexibility" inherent in the plurality's balancing approach, but that relative rigidity is required by our precedents and is not of my own making.

Chief Justice Rehnquist: *Okay. I sort of agree. But don't you want to complete your thought, Justice Souter?*

Justice Souter: As cable and telephone companies begin their competition for control over the single wire that will carry both their services, we can hardly settle rules for review of regulation on the assumption that cable will remain a separable and useful category of First Amendment scrutiny. And as broadcast, cable, and the cybertechnology of the Internet and the World Wide Web approach the day of using a common receiver, we can hardly assume that standards for judging the regulation of one of them will not have immense, but now unknown and unknowable, effects on the others.

Accordingly, in charting a course that will permit reasonable regulation in light of the values in competition, we have to accept the likelihood that the media of communication will become less categorical and more protean. Because we cannot be confident that for purposes of judging speech restrictions it will continue to make sense to distinguish cable from other technologies, and because we know that changes in these regulated technologies will enormously alter the structure of regulation itself, we should be shy about saying the final word today about what will be accepted as reasonable tomorrow.

Chief Justice Rehnquist: *I've heard this song somewhere. I suppose you, like everyone else, are going to quote Larry Lessig.*

Justice Souter: In my own ignorance I have to accept the real possibility that "if we had to decide today . . . just what the First Amendment should mean in cyberspace, . . . we would get it fundamentally wrong."[19]

The upshot of appreciating the fluidity of the subject that Congress must regulate is simply to accept the fact that not every nuance of our old standards will necessarily do for the new technology, and that a proper choice among existing doctrinal categories is not obvious. Rather than definitively settling the issue now, Justice Breyer wisely reasoned by direct analogy rather than by rule, concluding that the speech and the restriction at issue in this case may usefully be measured against the ones at issue in *Pacifica*.[20]

Chief Justice Rehnquist: *Does this mean—for the Advisory Committee—that there is no rule now, that all that exists is a context of cases from the past, and that no "simple formula" can be extracted from our jurisprudence as you see it?*

Justice Souter: If that means it will take some time before reaching a final method of review for cases like this one, there may be consolation in recalling that sixteen years passed from *Roth v. United States* to *Miller v. California* before the modern obscenity rule jelled; that it took over forty years, from *Hague v. CIO* to *Perry Ed. Assn. v. Perry Local Educators' Assn.*, for the public forum category to settle out; and that a round half-century passed before the clear and present danger of *Schenck v. United States* evolved into the modern incitement rule of *Brandenburg v. Ohio*.

I cannot guess how much time will go by until the technologies of communication before us today have matured and their relationships become known. But until a category of indecency can be defined both with reference to the new technology and with a prospect of durability, the job of the courts will be just what Justice Breyer did in *Denver Area*: recognizing established First Amendment interests through a close analysis that constrains the Congress, without wholly incapacitating it in all matters of the significance apparent here, maintaining the high value of open communication, measuring the costs of regulation by exact attention to fact, and compiling a pedigree of experience with the changing subject. These are familiar judicial responsibilities in times when we know too little to risk the finality of precision, and attention to them will probably take us through the communications revolution. Maybe the judicial obligation to shoulder these responsibilities can itself be captured by a much older rule, familiar to every doctor of medicine: "First, do no harm."

Chief Justice Rehnquist: *Justice Thomas, did you hear that: "Forty years!" "Do no harm!" I hear you grumbling.*

Do you want to respond here? Maybe you can be more realistic. After all, the Advisory Committee is supposed to report later this year and can't wait forty years. President Clinton will be gone by then, and Vice President Gore as well, no matter what happens in 2000.

Justice Thomas: Curiously, Justices Souter, Stevens, and Breyer seem to rely on "changes taking place in the law, the technology, and the industrial structure, relating to telecommunications," to justify its avoidance of traditional First Amendment standards. If anything, as they recognize themselves, those recent developments—which include the growth of satellite broadcast programming and the coming influx of video dialtone services—suggest that local cable operators have little or no monopoly power and create no programming bottleneck problems, thus effectively negating the primary justifications for treating cable operators differently from other First Amendment speakers.

Chief Justice Rehnquist: *Justice Thomas has a point. And Justice Stevens, you seemed pretty ready to reach a comprehensive view on how to decide constitutional questions generally with respect to the Internet in* Reno v. ACLU. *What you said there should be of interest to the Advisory Committee.*

Let's start with what you said about Red Lion. *All of a sudden, you seemed to say, it wasn't necessarily about scarcity either.*

Justice Stevens: In *Reno v. ACLU*, I wrote that in past cases, "the Court relied on the history of extensive government regulation of the broadcast medium," as a ground for "special justification for the broadcast media that are not applicable to other speakers." I asserted that the Internet was different: "Neither before nor after the enactment of the CDA [Communications Decency Act] have the vast democratic fora of the Internet been subject to the type of government and regulation that has attended the broadcast industry."

Chief Justice Rehnquist: *I'll wait to say what that rationale means for digital spectrum. Still, what about "scarcity"? It's pretty obvious that channels on the Internet aren't scarce.*

Justice Stevens: I agree. I said that "unlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a "'scarce' expressive commodity." Note however the adjective "expressive." I also said that the Internet "provides relatively unlimited, *low-cost* capacity for communication of all kinds.

Chief Justice Rehnquist: *That also might be relevant for digital spectrum. You had two pretty interesting and possibly relevant footnote in* Reno. *I know that we often stuff material into footnotes that we want to include, but don't know how.*

Justice Stevens: In one footnote I distinguished *Pacifica* on the basis of an often overlooked argument by Judge Leventhal, who wrote an opinion dissenting in the Court of Appeals. Here's what I said:

> When *Pacifica* was decided, given that radio stations were allowed to operate only pursuant to federal license, and the Congress had enacted legislation prohibiting licensees from broadcasting indecent speech, there was a risk that members of the radio audience might infer some sort of official or societal approval of whatever was heard over the radio. No such risk attends messages received through the Internet, which is not supervised by any federal agency.

Chief Justice Rehnquist: *That's cryptic. Why didn't you just announce that the Internet should be a regulation-free zone, just like newspapers?*

Justice Stevens: That was another footnote. One of the three judges in the District Court would have adopted a test that gave the Internet "the highest protection from government intrusion." In a footnote, I quoted Judge Dalzell's views: "Four related characteristics of Internet communication have a transcendent importance to our shared holding that the CDA is unconstitutional on its face. . . . First, the Internet presents very low barriers to entry. Second, these barriers to entry are identical for both speakers and listeners. Third, as a result of these low barriers, astoundingly diverse content is available on the Internet. Fourth, the Internet provides significant access to all who wish to speak in the medium, and even creates a relative parity among speakers." I dryly concluded that "because appellees do not press this argument" (that some super-standard be imposed), "we do not consider it."

PART II

Chief Justice Rehnquist: *I hope everyone enjoyed coffee and lunch. Let's close this discussion with a couple of clean-up points that the Advisory Committee might find useful.*

In our discussion this morning, we avoided the question which is pretty central, that of whose rights are involved. Can Congress just call cable or other multicasters "common carriers" and regulate them differently on the ground that they are not speakers?

Justice Thomas, this was a really interesting part of your partial and effective dissent—in which I and Justice Scalia joined—in Denver Area, *questioning the entire premise of most of the Justices that the plaintiffs—those who wanted access—had standing to challenge the federal statute.*

Justice Thomas: For many years, we failed to articulate how and to what extent the First Amendment protects cable operators, programmers, and viewers from state and federal regulation. I thought it was time, in *Denver Area* that we did so, and I could not go along with the plurality's assiduous attempts to avoid addressing that issue openly.

The plaintiffs in *Denver Area* were all cable viewers or access programmers or their representative organizations, not cable operators. It is not intuitively obvious that the First Amendment protects the interests petitioners assert, and neither petitioners nor the plurality adequately explained the source or justification of those asserted rights.

The First Amendment challenge, if one is to be made, must come from the party whose constitutionally protected freedom of speech has been burdened. Viewing the federal access requirements as a whole, it is the cable operator, not the access programmer, whose speech rights have been infringed. Consequently, it is the operator, and not the programmer, whose speech has arguably been infringed by these provisions.

Chief Justice Rehnquist: *Someone in the audience is waving enthusiastically: What are you trying to say?*

Anonymous Observer: Mr. Chief Justice, with all due respect, how do you reconcile your going along with Justice Thomas in *Denver Area* with your eloquent statement in *Pacific Gas and Electric*[21] about the speech rights of corporations? I have your earlier statement right here:

> Extension of the individual freedom of conscience decisions to business corporations strains the rationale of those cases beyond the breaking point. To ascribe to such artificial entities an "intellect" or "mind" for freedom of conscience purposes is to confuse metaphor with reality. Corporations generally have not played the historic role of newspapers as conveyers of individual ideas and opinion.
>
> In extending positive free speech rights to corporations, this Court drew a distinction between the First Amendment rights of corporations and those of natural persons. See *First National Bank of Boston v. Bellotti* and *Consolidated Edison Co. v. Public Service Comm'n of N. Y.* It recognized that corporate free speech rights do not arise because corporations, like individuals, have any interest in

> self-expression. It held instead that such rights are recognized as an instrumental means of furthering the First Amendment purpose of fostering a broad forum of information to facilitate self-government.
>
> The interest in remaining isolated from the expressive activity of others, and in declining to communicate at all, is for the most part divorced from this broad public forum purpose of the First Amendment. The right of access here constitutes an effort to facilitate and enlarge public discussion; it therefore furthers rather than abridges First Amendment values. Likewise, because the interest on which the constitutional protection of corporate speech rests is the societal interest in receiving information and ideas, the constitutional interest of a corporation in not permitting the presentation of other distinct views clearly identified as those of the speaker is *de minimis*.

Chief Justice Rehnquist: *I am the moderator here, and therefore will not comment on any opinion I might have had or might have now.*

Let's get back to Justice Thomas. I think that there's an important tie between how we think of Red Lion *and who has any right at all to complain.*

Justice Thomas: In *Turner*, by adopting much of the print paradigm, and by rejecting *Red Lion*, we adopted with it a considerable body of precedent that governs the respective First Amendment rights of competing speakers. In *Red Lion*, we had legitimized consideration of the public interest and emphasized the rights of viewers, at least in the abstract. Under that view, "it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."

After *Turner*, however, that view can no longer be given any credence in the cable context. It is the operator's right that is preeminent. If *Tornillo* and *Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal.* are applicable, and I think they are, then, when there is a conflict, a programmer's asserted right to transmit over an operator's cable system must give way to the operator's editorial discretion. Drawing an analogy to the print media, for example, the author of a book is protected in writing the book, but has no right to have the book sold in a particular book store without the store owner's consent. Nor can government force the editor of a collection of essays to print other essays on the same subject.

The Court in *Turner* found that the FCC's must-carry rules implicated the First Amendment rights of both cable operators and cable programmers. The rules interfered with the operators' editorial discretion by forcing them to carry broadcast programming that they might not otherwise carry, and they interfered with the programmers' ability to compete for space on the operators' channels.

We implicitly recognized in *Turner* that the programmer's right to compete for channel space is derivative of, and subordinate to, the operator's editorial discretion. Like a freelance writer seeking a paper in which to publish newspaper editorials, a programmer is protected in searching for an outlet for cable programming, but has no freestanding First Amendment right to have that programming transmitted. Likewise, the rights of would-be viewers are derivative of the speech rights of operators and programmers. Viewers have a general right to see what a willing operator transmits, but, under both *Tornillo* and *Pacific Gas*, they certainly have no right to force an unwilling operator to speak.

Chief Justice Rehnquist: *That sounds pretty relevant to the Advisory Committee's concerns, if they go along with your view.*

Let's wrap this up—no more outbursts—with a discussion of whose property we're dealing with any way. Can Congress call cable or the Internet or a satellite platform a public forum and regulate it accordingly? That would be pretty sweeping.

Justice Thomas, you dealt with this question—differing with Justice Kennedy—in your dissent in Denver Area.

Justice Thomas: A group of the petitioners in *Denver Area*, like the Alliance for Community Media, argued that public access channels are public fora in which they have First Amendment rights to speak and that the statute [allowing cable operators to kick them off for indecent and other speech] was invalid because it imposed content-based burdens on those rights. I do not agree that public access channels are public fora.

We have said that government may designate public property for use by the public as a place for expressive activity and that, so designated, that property becomes a public forum.

Cable systems are not public property. Cable systems are privately owned and privately managed, and petitioners point to no case in which we have held that government may designate private property as a public forum. The public forum doctrine is a rule governing claims of "a right of access to public property," and has never been thought to extend beyond property generally understood to belong to the government.

It may be true that title is not dispositive of the public forum analysis, but the nature of the regulatory restrictions placed on cable operators by local franchising authorities are not consistent with the kinds of governmental property interests we have said may be formally dedicated as public fora. Our public forum cases have involved property in which the government has held at least some formal easement or other property interest permitting the government to treat the property as its own in designating the property as a public forum. That is simply not true in these cases. Pursuant to federal and state law, franchising authorities require cable operators to create public access channels, but nothing in the record suggests that local franchising authorities take any formal easement or other property interest in those channels that would permit the government to designate that property as a public forum.

Similarly, assertion of government control over private property cannot justify designation of that property as a public forum. We have expressly stated that neither government ownership nor government control will guarantee public access to property. Government control over its own property or private property in which it has taken a cognizable property interest, like the theater in *Southeastern Promotions,*[12] is consistent with designation of a public forum.

But we have never even hinted that regulatory control, and particularly direct regulatory control over a private entity's First

Amendment speech rights, could justify creation of a public forum. Properly construed, our cases have limited the government's ability to declare a public forum to property the government owns outright, or in which the government holds a significant property interest consistent with the communicative purpose of the forum to be designated.

Nor am I convinced that a formal transfer of a property interest in public access channels would suffice to permit a local franchising authority to designate those channels as a public forum. In no other public forum that we have recognized does a private entity, owner or not, have the obligation not only to permit another to speak, but to actually help produce and then transmit the message on that person's behalf. Cable operators regularly retain some level of managerial and operational control over their public access channels, subject only to the requirements of federal, state, and local law and the franchise agreement. In more traditional public fora, the government shoulders the burden of administering and enforcing the openness of the expressive forum, but it is frequently a private citizen, the operator, who shoulders that burden for public access channels. For instance, it is often the operator who must accept and schedule an access programmer's request for time on a channel.

And, in many places, the operator is actually obligated to provide production facilities and production assistance to persons seeking to produce access programming. Moreover, unlike a park picketer, an access programmer cannot transmit its own message. Instead, it is the operator who must transmit, or "speak," the access programmer's message. That the speech may be considered the operator's is driven home by 47 U.S.C. @ 559, which authorizes a fine of up to $10,000 and two years' imprisonment for any person who "transmits over any cable system any matter which is obscene." See also @ 558 (making operators immune for all public access programming, except that which is obscene).

Chief Justice Rehnquist: *That has to be the last word. I have to go across the street and beg Congress to appoint a few more judges. I know that some of my Brethren want to continue and differ with Justice Thomas. You can continue informally.*

Thanks, then, to all of you, to The Aspen Institute and to the Advisory Committee. I hope this extraordinary little session has helped to clarify your thinking.

Endnotes

1. The point has been to make the discussion as human and accessible as possible, but this is not always easy as will be painfully clear. I have often removed references to citations to make the text move more quickly. The cases discussed in this Conversation are as follows (in chronological order): *Red Lion v. FCC*, 395 U.S. 367 (1969); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Pacific Gas and Elec. Co. v. Public Utilities Com'n of California*, 475 U.S.1 (1986); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994); *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 116 S.Ct. 2374 (1996); *Turner Broadcasting System v. FCC*, 520 U.S. 180 (1997); and *Reno v. ACLU*, 117 S.Ct. 2329 (1997).

2. See *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986): "In assessing First Amendment claims concerning cable access, the Court must determine whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics require a new analysis."

3. See *United States v. Southwestern Cable Co.*, 392 U.S. 157, 20 L. Ed. 2d 1001, 88 S.Ct. 1994 (1968); *United States v. Midwest Video Corp.*, 406 U.S. 649, 32 L. Ed. 2d 390, 92 S.Ct. 1860 (1972) *(Midwest Video I)*. Our decisions in *Southwestern Cable* and *Midwest Video I* were purely regulatory and gave no indication whether, or to what extent, cable operators were protected by the First Amendment.

4. 499 U.S. 439, 113 L. Ed. 2d 494, 111 S.Ct. 1438 (1991).

5. While members of the Court disagreed about whether the must-carry rules imposed by Congress were content-based, and therefore subject to strict scrutiny, there was agreement that cable operators are generally entitled to much the same First Amendment protection as the print media. (It is true that Justice Stevens said, concurring in part and concurring in judgment, that the "[c]able operators' control of essential facilities provides a basis for intrusive regulation that would be inappropriate and perhaps impermissible for other communicative media," but that is a different point.)

6. *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984).

7. *Turner* (1994), 663 (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668, n. 27, 32 L. Ed. 2d 390, 92 S.Ct. 1860 (1972) (plurality opinion) (quoting *Associated Press v. United States*, 326 U.S. 1, 20, 89 L. Ed. 2013, 65 S.Ct. 1416 (1945) (*internal quotation marks omitted*)); see also *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594, 67 L. Ed. 2d 521, 101 S.Ct. 1266 (1981).

8. *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L. Ed.2d 672 (1986).

9. See, e.g., *Schenck v. United States*, 249 U.S. 47, 51–52, 63 L. Ed. 470, 39 S.Ct. 247 (1919); *Abrams v. United States*, 250 U.S. 616, 627–628, 63 L. Ed. 1173, 40 S.Ct. 17 (1919) (Holmes, J., dissenting); *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624,

639, 87 L. Ed. 1628, 63 S.Ct. 1178 (1943); *Texas v. Johnson*, 491 U.S. 397, 418–420, 105 L. Ed. 2d 342, 109 S.Ct. 2533 (1989). At the same time, Supreme Court cases have not left Congress or the states powerless to address the most serious problems. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 86 L. Ed. 1031, 62 S.Ct. 766 (1942); *Young v. American Mini Theatres, Inc.* 427 U.S. 50, 49 L. Ed. 2d 310, 96 S.Ct. 2440 [*26] (1976); *FCC v. Pacifica Foundation*, 438 U.S. 726, 57 L. Ed. 2d 1073, 98 S.Ct. 3026 (1978).

10 See also, for examples of past tests, *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231–232, 95 L. Ed. 2d 209, 107 S.Ct. 1722 (1987) (requiring "compelling state interest" and a "narrowly drawn" means in context of differential taxation of media); *Saole Communications of California, Inc. v. FCC*, 492 U.S. at 126, 131 (1989)(applying "compelling interest," "least restrictive means," and "narrowly tailored" requirements to indecent telephone communications); [*27] Turner (1997), 512 U.S. at (slip op., at 16) (using "heightened scrutiny" to address content-neutral regulations of cable system broadcasts); and *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 566 (restriction on commercial speech cannot be "more extensive than is necessary" to serve a "substantial" government interest).

11 See, e.g., *Telecommunications Act of 1996*, 110 Stat. 56; S. Rep. No. 104–23 (1995); H. R. Rep. No. 104–204 (1995).

12 412 U.S. at 102.

13 I cited *Red Lion* for this proposition because it approved an access requirement limited to "matters of great public concern."

14 This finding is from *Turner I*, which found that *Red Lion's* spectrum scarcity rationale had no application to cable.

15 *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

16 See, e.g., Blasi, "The Pathological Perspective and the First Amendment," 85 *Colum. L. Rev.* 449, 474 (1985) (arguing that "courts . . . should place a premium on confining the range of discretion left to future decision makers who will be called upon to make judgments when pathological pressures are most intense").

17 See, e.g., *Telecommunications Act of 1996*, @ 551, Pub. L. 104–104, 110 Stat. 139–142 (8 Feb. 1996) (provision for "V-chip" to block sexually explicit or violent programs).

18 See *Telecommunications Act of 1996*, Title III, 110 Stat. 114–128 (promoting competition in cable services).

19 Larry Lessig, "The Path of Cyberlaw," 104 *Yale Law Journal* 1743, 1745 (1995).

20 See, e.g., Cass Sunstein, "On Analogical Reasoning," 106 *Harv. L. Rev.* 741, 786 (1993) (observing that analogical reasoning permits "greater flexibility . . . over time"); Kathleen Sullivan, "Post-Liberal Judging: The Roles of Categorization and Balancing," 63 *U. Colorado Law Review* 293, 295, n. 6 (1992) (noting that "once the categories are established . . . the categorical mode leads to briefs and arguments that concentrate much more on threshold characterization than on comparative analysis").

21 *Pacific Gas and Elec. Co. v. Public Utilities Com'n of California*, 475 U.S. 1 (1986).

22 *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

PART II:

ECONOMICS AND IMPLEMENTATION

Achieving the Public Interest in an Era of Abundance

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INTRODUCTION

The third and final meeting of the Aspen Institute Working Group on Digital Broadcasting and the Public Interest, held June 17–19, 1998, was devoted to refining the discussions of the previous two meetings. Two important themes explored by the Working Group at its third meeting had not been discussed at length in previous sessions. The first was that policymakers should broaden their scope to consider how the public interest in digital broadcasting might be achieved by other means than traditional public trustee content regulation. The second was the notion that any consideration of digital broadcasting policy should seriously consider the environment of other television and information media within which this new service is being born. Against the background of these themes, participants discussed policy options that had been raised at the first two Working Group meetings and explored a number of options that had not been considered in their prior meetings.

This report highlights the themes of alternative approaches to the public interest and the environment of media abundance, using them as a framework to organize the discussion at the third meeting. Broadly speaking, this report addresses the following question: How can the public interest in digital broadcasting best be served in an environment of media abundance? Focusing on this question provides a convenient way to connect many of the views expressed in the third meeting without recapitulating previous discussions. It also provides a means to focus on important considerations not discussed in previous reports. As a result, this document is in some respects less a report of the third meeting than a report *about* it, primarily based on ideas put forward by the participants.

This report begins by examining the traditional approach to achieving the public interest in broadcasting: content regulation. It describes the nature and justification of this approach and then discusses concerns about whether the theory and practice underlying it are applicable to digital broadcasting in an era of abundance. The report then reviews three alternative approaches to achieve the public interest in digital service discussed by participants in the third meeting of the Working Group, and it relates some of their ideas about how media abundance affects the merits of these options. The three alternatives to content regulation are (1) reliance on market forces, (2) industry self-regulation, and (3) subsidies. Finally, the report sounds a cautionary note that any policies applied to digital broadcasting may have unintended consequences for the policies that govern other media.

CONTENT REGULATION AND ITS PROBLEMS

The Rationales for Regulation

The Telecommunications Act of 1996 reiterates the admonition of the Communications Act of 1934 and the Radio Act of 1927 that broadcasters must serve "the public interest, convenience, and necessity."[1] Taken at face value, this admonition is no more than a statement of the grounds for asserting a government interest in the operations of any industry covered by the Constitution's commerce clause. Regulations of railroads, airlines, banks, and power companies might be explained in similar language, although more particular reasons for government intervention are required to explain exactly why and how regulation is applied to each industry: exactly what the public interest means in each case. Likewise, there are limiting conditions on public interest regulation of particular industries. In the case of broadcasting, the First Amendment provides such a limit.

Since 1934, the public interest standard in broadcasting has been construed by the Federal Communications Commission (FCC), Congress, and the Courts to mean that each broadcaster must act as a "public trustee." (While the term itself has not always been used, adherence to the ideas flowing from it has been remarkably consistent whatever the terminology.) In practice, this has meant that each broadcaster must act as an agent of the public to ensure that content is transmitted that members of the public wish to receive or from which they might benefit. To aid broadcasters in determining what that content should be, the FCC and Congress have adopted a host of affirmative obligations as well as prohibitions on broadcast content. Among the affirmative obligations have been local coverage, fairness, access and equal time for political candidates, and programming suitable for children. Among the prohibitions have been cigarette advertising, obscenity, payola, rigged quizzes, and cross-ownership that might bias news reporting. The role of the FCC and Congress in this regard leaves in question whether broadcasters or the government are the actual "trustees," but the vagueness of many affirmative obligations at least maintains the notion that broadcasters have both discretion and responsibility to decide what they must do to satisfy public wants and needs.

It has always been recognized that this type of content regulation is intrusive on commerce, inherently subjective, difficult to enforce and troublesome on First Amendment grounds. It has, however, repeatedly been upheld as constitutional by the Supreme Court. And the relevant Court decisions have provided much of the policy justification both for regulating content in the first place and for the form content regulation has taken.

Probably the most weighty justification was provided by the Supreme Court in a series of decisions culminating in the 1969 *Red Lion* decision.[2] The Court affirmed scarcity of spectrum and the resulting scarcity of broadcast assignments in any given market as the justification for regarding broadcasters as public trustees and for content regulation based on that notion. Due to technical considerations and legislative decisions, only a few broadcasters in any given market are the purveyors of entertainment, news, and public service over the airwaves.[3] The public has to take what these broadcasters offer or do without the benefits of broadcasting. The Court judged that both the benefits of the medium and the potential for abuse of the broadcasters' oligopolistic power were great. As a result, it ruled that it is in the public interest to impose an obligation on broadcasters to act as trustees and for Congress and the FCC to specify and enforce that obligation.

Pervasiveness is a second justification for regulation, first articulated by the Court in the 1978 *Pacifica* decision.[4] Because so many people listen to so much radio and watch so much television, these media have enormous social impacts. As a result, government is justified in regulating content to mitigate some adverse effects (in the case of *Pacifica*, broadcasting of indecent language).

Market deficiencies have been cited as a third ground for regulation. This argument is implicit in *Red Lion*. Broadcasting is a commercial medium. As a result there is little incentive for broadcasters to transmit content for which there is not a large audience and/or the potential for advertising revenue. For example, broadcasters do not optimize their revenues by transmitting public service content such as health and safety information, robust coverage of political campaigns, high-quality drama, or programming primarily of interest to particular ethnic minorities. Market deficiency arguments contend that commercial broadcasting is the only means by which the public can gain these types of services over the airwaves. As a result, broadcasters should set aside their commercial interests from time to time, and it is legitimate for government to force them to do so.

Public ownership of the airwaves is the fourth common rationale for content regulation.[5] According to this argument, the electromagnetic spectrum is a natural resource that belongs to all Americans, like public lands or water resources. To make it useful, the government licenses some people to engage in commercial broadcasting. This allows them to create great wealth and denies the opportunity to others. In return for this grant of a valuable commodity, the government is justified in asking for something back, just as it receives rents on public lands. Asking that broadcasters do a good job of serving public wants and needs is a reasonable *quid pro quo*.

Underlying all of these justifications, and possibly more important than them in driving policy, have always been assumptions about the major social benefits that broadcasting should achieve. Two of these are particularly worthy of mention, because they are so frequently cited in current debates. First, it is widely assumed that broadcasting does and should play a major role in the American political process by providing a forum in which candidates for office and others concerned with public affairs can present their views to the public, and in which those ideas can receive a critical response in the marketplace of ideas.[6] Because broadcasting has come to play such a large role in the political process, the quality of its public affairs programming, campaign coverage, and political access practices have been matters of great concern.

The effects of broadcasting on children is the second area of great concern.[7] On the positive side, many people believe that broadcasting has enormous potential to "educate" children, both in the narrow and larger senses of the term, and that it has an obligation to do so. On the negative side, there are widespread concerns that broadcasters too often offer content (such as violence and indecency) that can be harmful to children. Because children watch so much television, there has been a presumption that government is justified in regulations that try to maximize the positive content and minimize the negative.

The Era of Abundance

As the FCC, Congress, broadcasters, and the public consider how to treat digital broadcasting, this legacy of thinking about content regulation is the primary intellectual capital with which they have to work. In the Telecommunications Act of 1996, Congress made clear that it expected digital broadcasters to live up to a "public interest" standard.[8] And it is certainly tempting to interpret this mandate as simply a recipe to import into the digital age both the justifications for content regulation that have evolved over the years and the means of enforcing them. But developments in the telecommunications industry over the last twenty years raise serious questions about whether the longstanding justifications for regulation and the specific rules that have flowed from them still stand up, at least in the ways they have previously been understood.

Collectively, these developments can be characterized as the development of an era of media abundance. About two-thirds of households now subscribe to cable television, and that medium offers up to one hundred channels of television containing highly diverse fare. More than 90 percent of households own VCRs, which allows them to buy, rent, or borrow tapes from a virtual national "library" of hundreds of thousands of titles on every conceivable subject presented in every conceivable way. Arguably, the number of titles available on tape is larger and more diverse than the number of titles available at even the largest bookstores. The advent of satellite broadcasting to the home has provided even more options than most cable systems offer. The Internet already offers an enormous storehouse of information and entertainment to which anyone can contribute, and its potential for expanding its present service as well as for transmitting both audio and video is theoretically limitless.

None of these newer media services were widely available when *Red Lion* was decided in 1969. In a very brief period of time we have moved from an environment in which the choices of most consumers of electronic media were limited to the broadcasting stations in their market to an environment in which most people can get pretty much anything they want from one medium or another. In many ways, the advent of digital broadcasting is only the latest development in this trend. And if they multiplex, digital broadcasters will be adding additional channels and services to the nation's already rich diet of media choices.

Is There Still a Case for Content Regulation?

In this environment, the traditional rationales for broadcast regulation may not be as compelling as they once were. At the very least, there may be a need to reformulate them. The Aspen Working Group debated these issues.

Over-the-air broadcasting spectrum is still scarce, although less so with the advent of digital possibilities. But if the significance of scarcity was that it restricted choices, it is harder to argue that regulation of broadcasting is still justified when choices within the larger media environment are abundant. Why should spectrum scarcity matter from a public interest standpoint, unless it affects the public in some adverse way? If other media are fungible with broadcasting, then where is the adverse effect?

Likewise the pervasiveness argument is challenged by abundance. Television and radio are pervasive in the sense that they are heavily used and influential. But broadcasting is now only one way in which television and radio pervade American life. In fact, broadcasting has lost significant audience share to cable, and people who want to enrich or restrict their diet even further can turn to video tapes or, increasingly, the Internet. As a reason for prohibiting certain content, pervasiveness loses some of its luster when people can limit their viewing to other media; as a reason for imposing affirmative obligations, it is harder to justify when there are so many choices.

Market imperfections are harder to define in a market as rich as the electronic world of today. Certainly many of the commonly cited imperfections (such as lack of abundant news and cultural programming) are remedied by cable and satellite. And a case can be made that defects in service to children are also greatly reduced by the availability of cable channels such as Nickelodeon, by children's video tapes, and by interactive Internet services designed for children.

Finally, public ownership is arguably beside the point in an environment of abundance. If the public receives the service it needs and wants, then there is no need to extract a *quid pro quo* for spectrum usage by content requirements. The public interest could also be served by auctioning off the spectrum and putting the receipts in the general treasury, in the same way that surplus military equipment is sold.

Does Content Regulation Still Stand Up?

The environment of abundance, thus, challenges the traditional justifications for content regulation, and by doing so it challenges whether this regime should be applied to digital services. But some participants in the Aspen Working Group were not convinced that it entirely eliminates the case for regulation. They emphasized the unique characteristics of broadcasting. The justification for regulation that advocates of content regulation often articulate is an amalgam of the traditional arguments mentioned above. But their most common argument appears to be a variant on the market failure case. This argument might be called "market dominance." While participants in the Aspen meeting would probably not fully embrace this justification and all of its ramifications, they did discuss some of its ideas. For purposes of exposition, an unqualified case for it is set out below.

Advocates of content regulation in an era of abundance point out that the abundance is often overstated. Despite the plethora of choices, it remains the case that the three major broadcast networks still command the lion's share of television viewership, and they are still the major source of television entertainment, as well as national news and public affairs information, for most Americans. Moreover, local stations are virtually the only electronic media that provide news and public affairs information about their communities, as well as locally oriented health and safety messages. Finally, advertiser-supported over-the-air broadcasting is the only source of television for the one third of Americans who do not subscribe to cable or direct satellite service. Unlike other video services, over-the-air broadcasting does not require the payment of subscription or rental fees. The only direct, out-of-pocket payment cost of receiving broadcast service in all but the most remote of areas is the purchase of a television set.

Cable, satellites, and other media could challenge commercial broadcasters for dominance in entertainment, news, and public service, but thus far their challenges have not dethroned the older media. Broadcasters have obtained and retained their eminence because of their business and creative acumen, as well as the audience loyalty they inherited from the many years when they had a virtual monopoly on the media market. Moreover, even if the challenge of newer media was effective, it still would not benefit the tens of millions of Americans who do not live in an environment of media abundance.

This means that many longstanding concerns about the effects of broadcasting still apply today. If national networks or local stations tilt the news or discriminate against candidates for public office, the public will be ill served in the democratic process. Children are still exposed to a wide range of broadcast content, regardless of its suitability for them. If stations fail to cover local public affairs or to broadcast hurricane warnings, some people will be uninformed or endangered. With regard to prohibitions, advocates of content regulation could argue that anyone who would completely deregulate broadcasting must make a case why cigarette advertising, pornography, and payola should be part of the most widely used and influential video medium.

These advocates point out that many of these concerns are far from hypothetical. Critics contend that much network news has become "tabloid-ized," that local news focuses on the sensational, that children are still exposed to trivial and often offensive programming over the air waves, and that the terms and conditions under which political candidates and others can gain access to broadcast time are far from optimal. The Aspen Working Group discussed coverage of the California primary elections in the spring of 1998 as an example of the failure of broadcasters to provide adequate local coverage. Until a *New York Times* story chastised them two weeks before the election, California stations gave little or no news coverage to the races, and many refused to sell air time to "down-ticket" candidates.

If we abandoned public trustee regulation, according to its advocates, we would be abandoning many of the public interest goals it has attempted to advance over the years. These goals are still valid and achievement of them is endangered, despite the era of abundance. This is because broadcasting still exercises market dominance, and it is a commercial medium that is limited in what it will provide by the need to maximize advertising revenues.

A Middle Road?

The Aspen Working Group briefly discussed one possible way to maintain the benefits of regulation while taking advantage of the era of abundance. This approach would retain most present regulations, but it would apply them to media markets, rather than to individual broadcasters. Licensees in each market would still be bound by public trustee requirements, but these requirements would be satisfied if at least some stations in each market, possibly in conjunction with cable or other media outlets, provided the service necessary to achieve public service goals. This would create a policy regime analogous to the "pollution rights" policy that has been successful in some aspects of environmental regulation. Broadcasters could trade or sell "trustee rights" to determine which stations would assume which public trustee obligations. This might work particularly well in a digital environment, because broadcasters could have the further option of deciding to concentrate their public service on one or a few mutiplexed channels, or to determine which station would have to satisfy public service obligations by high-definition television in prime time. Also, broadcasters might be allowed to subsidize public broadcasting or cable channels to fulfill some of their obligations. In a modified form, this approach has already been adopted by the FCC in its requirement for three hours per week of children's television programming.[8]

While some members of the Working Group believed this approach merits further exploration, others objected that it does not solve many traditional concerns. Children would still be exposed to inappropriate content, local public service would still be poor on most channels, and at best "ghettoized" to a few, high-quality programming would be scarce, and prohibitive regulations might be endangered. Moreover, a system of distributing public trustee obligations would be even more difficult to police than is the present system of content regulation, and it is not clear who would be liable if it failed. Finally, just as "pollution rights" have gained a negative image in the eyes of the public because they are perceived as sanctioning pollution, trading "trustee rights" might evoke the visceral reaction that it is acceptable for broadcasters to neglect the public interest.

The Need to Look Farther

There is clearly something to both sides of the argument about content regulation, or the argument would not be as vigorous as it is. Obviously most Americans have access to far more media alternatives than they once did and this access moderates some of the concerns that have traditionally led to content regulation. Obviously, too, some Americans do not have this access and many others choose not to take full advantage of it. The media environment has changed. But at least some members of the Aspen Working Group were concerned that there is still not a satisfactory theory of exactly what these changes should mean for content regulation. One thing they probably mean is that past regulations need a thorough review to determine whether they are still, on balance, relevant to the new environment. The Working Group acknowledged this by reviewing them from the perspectives mentioned above. The changed environment also means that approaches to achieving public interest goals other than content regulation deserve more serious consideration, and the Working Group discussed three of these: (1) reliance on market forces, (2) industry self-regulation, and (3) subsidies.

ALTERNATIVES TO CONTENT REGULATION

Free Market Approaches

At a time when regulation is in disfavor and the benefits of the free market are widely celebrated, it makes sense to consider whether or how content regulation actually improves on what the free market might deliver.[10] This may be one way to bound the reach of regulation in an era of abundance.

For the market. Despite the longstanding argument that regulation is justified in part by market failure, broadcasters for some time have pointed out that the United States undoubtedly has a television and radio broadcasting system that is the envy of the world. They have also argued that American broadcasters engage in extensive public service activities well beyond those required by federal regulations, such as long-format local news, airing hundreds of millions of dollars worth of public service announcements, selling time to state and local candidates even though this is not required, sponsoring state and local candidate debates, preempting commercial programs for coverage of important local or national developments, and producing at least some innovative children's programming.

Advocates of the market claim that the best of American television, such as the entertainment programming at which it excels and the comprehensive coverage of critical events, such as the Gulf War, are not the results of regulation. Broadcast television satisfies its public interest obligations by the most relevant measure: it satisfies its audience, and it has held on to most of that audience despite competition from other media. The market works remarkably well, and those who point to deficiencies are looking for perfection in an imperfect world. Other media and public broadcasting can satisfy most of those deficiencies in the era of abundance. If members of the public care enough about satisfying them, they will switch to a cable channel of their choice, rent a video tape, or support non-commercial outlets.

In response to criticisms of broadcast coverage of the 1998 California primaries, advocates of the market at the Aspen meeting argued that there were one hundred state-wide candidates on the ballot, and even more local candidates, along with referenda and groups seeking issue advertising time. This is more than the broadcast media in any California market could conceivably cover without causing confusion on the part of the audience and eliminating commercial fare that is of greater interest to most viewers. Nor could the stations have sold advertising time to all candidates without undermining their commercial base.

Advocates of the market as well as some other participants in the Aspen meeting argued that the competition for broadcast time by politicians and advocacy groups is a fundamental problem of the American political system that broadcasters cannot solve. Only a larger debate about campaign reform can solve it. As for criticisms of their failure to provide long-format access to political candidates, a number of participants in the meeting argued that most candidates do not want it and would only use it to offer canned responses. Moreover, why should government be in the business of dictating what types of political speech are to be preferred?

Finally, advocates of the market as well as some other participants, argued that affirmative content regulation, at least, has never been effective. Both the FCC and Congress have lacked the will to specify affirmative regulations in enough detail, and the FCC has lacked both the ability and the will to enforce them in more than a haphazard way. The result has been that they have little effect, and sometimes can create perverse incentives. For example, the "equal time" rule may discourage stations from presenting more robust political coverage.

Because of the failure of affirmative content regulation, the broadcasting industry we have today is essentially the creation of the free market, according to its advocates, and it is very good by most standards. Its achievements are due in no small part to a culture of public service: values that broadcasters have internalized over the years and that make good business sense in terms of building loyalty within their communities. Why continue the charade of content regulation, particularly when it is offensive to the First Amendment?

Contrary concerns. Arguments for the free market are very compelling on first blush. But its critics contend that, while broadcasting at its best is very good, it too often operates at its worst. It trivializes serious local and national issues, largely ignores the needs of children, and does far less than it could to promote democratic debate. One participant in the Aspen meeting called these concerns "paternalistic" in the era of abundance, but defended them nonetheless. Affluent and educated Americans have ample access to whatever entertainment and information they want, and they usually take advantage of their opportunities. But those who rely primarily on broadcast television are getting a poor diet of information and entertainment. Such judgments are subjective, but so are any definitions of the public interest in any sphere. The fact that the nation has chosen to fund public broadcasting as an alternative and to assent to content regulation means that many other people believe the market in broadcasting has serious deficiencies.

Critics of the market believe that because broadcasters enjoy the dominant position as sources of video for so many Americans, there is a compelling interest in demanding that they do more—not just occasionally and when they believe it is appropriate, but consistently and in all cases. It is in everyone's interest that all Americans, not just the information elites, be well served and well informed. While content regulation has often been ineffective, this may be because the FCC has only made a half-hearted effort at enforcement. The answers to its shortcomings may be to make standards more explicit and better targeted at their goals and to enforce them more rigorously, rather than to give up on the public trustee notion. At the very least, content regulation serves a precatory role. Broadcasters are reminded that the public interest lies in certain directions. Actual enforcement of public trustee standards in all cases may be less important than the threat of enforcement, and occasional FCC actions to correct egregious abuses may serve the same purpose as spot audits.

Balance. In balancing these two sides of the argument, three possible areas of agreement appear: (1) The effectiveness of market forces should not be minimized. Over-zealousness in regulation is pointless and often ineffective; any reconsideration of broadcast policy should take full account of what broadcasters can and will do, as well as their limitations and failures. (2) Even the strongest defenders of the free market agree that commercial broadcasting cannot satisfy all possible social needs for media service. Policies that encourage or take account of the contribution of Public Broadcasting and other media to filling those gaps should be in the forefront of attention, as well as mechanisms other than regulation to enlarge their role. (3) If content regulation is still desired, the mechanisms for enforcing it must be greatly improved. For example, most political access regulations place broadcasters in the role of traffic cop among candidates, without any clear rules to guide them. Perhaps the rules should be better, or perhaps someone else should be the cop. Likewise setting aside blocks of time for children's programming is a weak policy unless some quality standards are set, although the process of setting such standards is a daunting prospect and may not be an appropriate use of government power.

Industry Codes

One possible way to achieve public interest goals while maintaining the benefits of the market in broadcasting is through industry self-regulation. In fact, the National Association of Broadcasters (NAB) maintained a code of conduct for its members for several decades. It was partly undermined by court challenges in *Writers Guild of America, West v. ABC* (1979) and related cases.[11] The cases concerned a provision of the code that the industry had adopted at the urging of the FCC and Congress. The provision established a one-hour time period in the early evening for programming that would be suitable for "family viewing" (i.e., that would contain programming suitable for children and otherwise inoffensive). The courts questioned whether the family viewing provision was an unwarranted exercise of government action, due to the pressure exerted on the industry to adopt it. Thereafter other provisions of the code were called into question, and the NAB eventually abandoned it all.

Trust the trustees? Self-regulation plays an important, although not exclusive, role in the operation of many industries, such as the licensed professions, where entry is restricted, stakes are high, consumer information is limited, and a special relationship of trust is presumed to exist between the public and the industry. One way to operationalize the public trustee notion in broadcasting would be to trust the trustees. The common law notion of trusteeship presumes that trustees will be faithful to their missions unless proven otherwise.[12] As a result, it allows them a large measure of discretion in how they will discharge their duty as long as they honor the essential goals of their trust. One problem with this analogy, however (and with the "public trustee" metaphor generally), is that trustees are presumed to be disinterested, and their cardinal sin is acting in a self-interested way. Clearly broadcasters are not disinterested, and this is why many aspects of the public trustee notion break down. Nevertheless, the presumption in broadcasting policy has always been against them. If we reverse this way of thinking, can broadcasters be trusted to advance public interest goals through self-regulation?

Interpretations of the efficacy of the NAB code differ. By some interpretations it was overly broad, poorly policed, and contained few provisions that broadcasters would not have found in their commercial interests. By other interpretations, it set reasonable standards for public interest performance and helped create a culture of public service within the broadcasting industry.

Some participants in the Aspen meeting argued that a code could be more effective if it spelled out specific performance measures and if there was a reporting mechanism not controlled by broadcasters that would issue periodic reports on how stations live up to them. In that case, the public reputation of broadcasters would be at stake in living up to the code. Bad operators would suffer in the eyes of the local viewing public, whose opinions matter very much to them. Other participants questioned whether a code could ever address obligations that conflicted with commercial interests and whether it would be taken seriously without the prospect of government enforcement: in effect content regulation. They were also concerned that such a code would act as a smoke screen or public relations stunt to hide industry abuses.

Some participants argued that a middle ground, by which government and industry collaborate in establishing and enforcing a code, would probably fall victim to the same court challenges that undermined the family viewing hour. As a result, they held that any code would have to be purely industry developed and enforced.[11]

Self-regulation and abundance. In an era of abundance, self-regulation may seem more attractive than it would otherwise appear. To hold audiences who may turn to other media, broadcasters need to use every tool they can muster. Enhancing their reputation with the public by effective self-regulation may be attractive to them. In addition, there is less at stake if they fail. If the public knows what they aren't getting from broadcasters, they have the means to get it elsewhere.

But the era of abundance also raises the question of whether or how self-regulation should take account of other media. Should it, for example, contain provisions that allow broadcasters to suspend certain obligations if they are satisfied by some other generally available medium or to subsidize other broadcasters or other media to take on some of their obligations—a self-imposed version of the "pollution rights" model discussed above? If it is the case, as broadcaster contend, that they cannot possibly satisfy all demands for public service, it would seem that they should take some responsibility for considering which demands cannot be satisfied and what they can do to ensure that they are satisfied. This opens up a whole new territory for self-regulation (or regulation of any sort). The idea may be worth pursuing, but it would certainly be difficult to implement. Moreover, it could serve as an incentive for "buck passing" on the part of broadcasters: the too ready assumption that anything they find difficult can and should be done by someone else.

In sum. At least four ideas seem clear about self-regulation in an era of abundance. First, challenges to the traditional rationale of content regulation require that alternatives that would achieve the same goals should at least be considered. Second, while it is doubtful that self-regulation would be wholly effective in meeting public interest standards, there is some chance that it might make a contribution. Third, the major risk appears to be that self-regulation would muddy the waters in broadcasting policy, both for the public and for policymakers; it could well be an excuse for deferring action on problems that are both important and difficult. Fourth, to withstand court challenges, any scheme of self-regulation would probably have to be created by the industry without government interference, and to be effective it would have to contain a credible monitoring system.

Subsidies

For those who are not satisfied with content regulation, the free market, or self-regulation as means of achieving public interest goals in broadcasting, the era of abundance opens up another possibility. Why not subsidize either particular broadcasting channels or services via cable or the Internet to offer services that the market does not deliver in great enough quantity or quality? It is possible to imagine a children's channel, an educational channel, a public affairs channel, or some combination of these.

The Aspen Working Group considered various subsidy schemes at its prior meetings. Among these were charging digital broadcasters a spectrum usage fee which would be used to support educational broadcasting and possibly to create a "political time bank" to improve access by candidates. Versions of this ideas have been discussed at least since the 1970s. Another family of options would allow or require broadcasters to subsidize meritorious programming in kind. For example, variations on the "pay or play" model would allow licensees to either satisfy specified public service requirements by their own operations or to pay a fee that would be used to subsidize them elsewhere. The putative advantages of this model are that it would take advantage of the creative resources of broadcasters for public service purposes, and it would inject public service programming into the diet of what are presently the dominant media outlets. Still another version would auction off or lease the analog channels that broadcasters have previously occupied, and/or some of the analog or digital channels assigned to Public Broadcasters, to create an endowment or continuing stream of income for public service broadcasting.

Rationale for subsidies. However they are designed, these options are all ways of subsidizing meritorious programming. In any form this idea abandons the longstanding notion that each broadcaster should be regarded as a public trustee, at least in the sense that each should be required to fulfill all public interest obligations by their own broadcasting operations. It takes the broader view of mass media service adopted by the "pollution rights" model. The goal becomes to ensure that the public is somehow well served in each television market, rather than that particular broadcasters satisfy its needs.

In at least one form the idea of subsidies to achieve public interest goals has already been adopted. Public Broadcasting was created in the 1960s as a publicly subsidized system to compensate for the deficiencies of commercial broadcasters. The Killian Commission, which played an important role in establishing public broadcasting, recommended that the new service should be supported by a tax on television set sales, although this idea was not accepted by Congress.[14] A 1979 Carnegie Commission on Public Broadcasting suggested support by a spectrum usage fee.[15] Many subsidy arguments today presume that Public Broadcasting would be a major beneficiary of any system adopted.

One important element of most subsidy ideas discussed at the Aspen meetings was that commercial broadcasters would be relieved of some or all of the content regulation that has been imposed on them as a quid pro quo for paying a spectrum fee or accepting a "pay or play" system. This distinguishes these subsidy plans from "pollution rights" ideas, on the one hand, and the present system of supporting Public Broadcasting, on the other.

Subsidy plans of any sort are usually justified by a combination of the market deficiency argument (commercial broadcasters simply will not fulfill all public interest goals) and some combination of the public ownership and spectrum limitation arguments (commercial broadcasters have been given valuable spectrum and the public deserves some *quid pro quo*). They are also justified by arguments that content regulation has failed and/or is burdensome to the First Amendment. Both on administrative and constitutional grounds it would be more efficient to simply charge broadcasters a fee to subsidize meritorious programming, rather than try to micro-manage their content. Finally, by conferring new value on commercial broadcasters, new digital assignments provide a rationale for demanding a new *quid pro quo*.

Support for subsidies. Subsidy models have not won much support in the past. The fact that they are being revived in discussions of broadcast policy is due partly to the continuing difficulties of funding Public Broadcasting (and the cost of its transition to digital service) and partly to concerns about the American electoral process, among them the belief that coverage of elections and other public affairs is inadequate and that the system of providing access to candidates has failed. It is also partly a response to criticism of the new digital assignments as a "give away" to vested interests.

But the revival of interest in subsidies is also probably a result of the era of media abundance. Many traditional public service goals, such as abundant and high quality news, public affairs, children's programming, culture, and drama are today being satisfied by cable for the majority of Americans, and by tapes and the Internet for many others. For many years policymakers hoped that the availability of a greater number of media outlets would result in a proliferation of services not offered by commercial broadcasting. This hope has now been realized. Moreover, the newly assigned digital channels can be used by multiplexing to create a great many special over the air broadcast services—by commercial broadcasters, public broadcasters, or both—that can bring greater abundance to the one-third of households not served by cable.

In essence, the era of abundance invites policymakers to distinguish between the longstanding goal of public service by the television industry and the public trustee notion of how this can be achieved. In an era of abundance, public service goals can perhaps be achieved by subsidies, rather than by holding each station responsible for achieving all public service goals. And it can be achieved without depriving any broadcasters of their licenses to reap profits from commercial operations in the markets they serve. The public simply gets a "cut of the action" to subsidize other service, for which there is now ample spectrum space.

Problems with subsidies. There are, however, several problems with the subsidy idea. First, it is not entirely clear who the recipients should be. Public Broadcasting is often mentioned, because it already exists as, in effect, the "public trustee of last resort." But in an era of abundance, Public Broadcasting is not necessarily the obvious choice. Many people who are concerned about achieving public interest goals are dissatisfied with both Public Broadcasting's governance and the service it provides. If improved public affairs or children's programming are among the goals, a case could be made for subsidizing some of the cable services that already offer such programming to lease broadcast outlets, for subsidizing cable service to disadvantaged families, or for creating a competition to determine who gets the subsidies.

A disturbing feature about these and other options is that they put the government in the business of determining who is the best purveyor of certain types of content and, by extension, of determining what content should be supported. The recent controversies surrounding the National Endowment for the Arts indicate how troublesome this governmental role can be. It is all the more troublesome in the mass media, because of its reach and influence. It may be that some satisfactory arrangement can be devised, but the problems of doing so involve a careful consideration of the appropriate bounds and mechanisms of government action, rather than simply sorting out administrative details.

A second problem with subsidy plans is that most of them would offer broadcasters a measure of deregulation as a *quid pro quo* for paying a spectrum fee or engaging in a "pay or play" system. There is no necessary reason why broadcasters should be offered a *quid pro quo* in either case. It has long been argued that broadcasters should pay a spectrum fee simply because they derive great value from their assignments. This is, at least, the most apparent grounds for the outcry about a "give-away" of digital frequencies. Of course, such arguments have not gotten very far in the past, and a *quid pro quo* may be politically necessary. But a case can be made for spectrum fees without deregulation, and it probably will be made in the debates over digital broadcasting to come.

Third, even if it is desirable, the *quid pro quo* proposed to broadcasters may not, in fact, be realistic. Perhaps they can be relieved of some of their affirmative trustee obligations, but would anyone propose lifting regulations on cigarette advertising, obscenity, multiple ownership, and payola? It is not even clear that, in the interests of promoting fairness in democratic debate, that the equal time restrictions would be lifted. In short, would a subsidy program be deregulatory in any meaningful sense? The FCC and Congress have already lifted many of the most onerous regulations on broadcasters. Does it have much to offer them in a *quid pro quo* for spectrum fees?

Fourth, in an era of abundance, it is not clear that subsidies are necessary. Arguably, most Americans already have access to adequate service from various media, and whether or not they take advantage of them is their affair. No one knows how broadcasters will use digital capacity. But it is at least possible that they will offer specialized children's and public affairs programming. Perhaps it would be best to wait and see how the market works.

Fifth, by themselves subsidy systems do not solve one of the problems that parents in particular are most concerned about: the availability of programming unsuitable for children on almost all television outlets. Short of draconian content regulation, this problem can be partly addressed by technologies like the V-chip and television locks. Subsidy systems could make a contribution by supporting "safe haven" or "green space" channels for children. But this raises problems of who would decide what is "safe" and of how to serve the needs of children of differing ages. Still, subsidizing high-quality children's channels is an idea that has been mooted for decades, and it merits more consideration, particularly now that there are more media outlets on which such programming could be aired.

The paradox of abundance. The final problem with plans to subsidize meritorious programming on Public Broadcasting, digital service, or elsewhere is that the era of media abundance creates a cruel paradox. The paradox is that the public may be confused by more choice and not take advantage of the options available. As a result, subsidizing public service programming may accomplish very little, because very few people may watch it. To put this differently, television is used primarily as an entertainment medium, and specialized channels for public affairs or children may become "ghettoized" for all but the most dedicated few. In fact, this appears to be the case. While specialized cable channels do well, their ratings relative to those of commercial broadcasters are very low.

The Aspen Working Group discussed this problem in previous meetings as an issue of the "attention economy." There is no point in subsidizing public service programming unless people are aware of it and find it convenient to use. If this is true, the best way to get that programming into the public attention stream is to require that commercial broadcasters carry it, because they have the largest audience share of any media. This might well require continuing some form of content regulation, although not necessarily the set of policies that are currently in force.

The Aspen Working Group previously characterized the situation as a choice between whether the public interest could best be served by a "push" model (requiring meritorious service on commercial broadcasting where people will be most likely to find it) or a "pull" model (segregating meritorious service and trying to draw attention to it). A version of a "push" model that avoids traditional content regulation, for example, would be to use spectrum fees or some other subsidy method to buy time on commercial broadcasting for meritorious service. A "pull" model would be to purchase or require advertisements for that service on commercial broadcasting. One idea proposed by an Aspen participant to improve the "pull" of political information is to require broadcasters to air information about the Web sites of political candidates and their opponents or the sites of other sources of political information, such as The Democracy Network or the League of Women's Voters.

Both push and pull models are valuable ways of thinking about the problems that "the attention economy" creates for plans to subsidize media content. But any policies to either push or pull would decidedly put government back in the business of determining what content should be favored and of monitoring whether this occurs. Under either scenario, broadcasters would still act as trustees in some important way. Perhaps some version of these schemes would be less onerous than traditional content regulation, but others might not be. Still, it can be argued that adopting policies that either push or pull members of the public toward certain content is tantamount to government handicapping the programs they watch. Perhaps providing more choice to more people may be enough to satisfy any realistic public interest concerns.

The issues. Subsidy models certainly have appeal in an era when there are a great many media outlets and regulation is in disrepute. But policymakers must wrestle with a number of difficult questions. Among these are (1) How great is the need for subsidies in an era of abundance, and for whom? (2) Who should be the beneficiaries of subsidies (effectively, the "new trustees")? (3) Should the government be in the business of subsidizing content at all? (4) Do the paradoxes of "the attention economy" mean that little would be gained by many forms of subsidy? (5) Should government seek to increase the reach of subsidized programming by "pushing" or "pulling" the public toward it?

THE DANGER OF REGULATORY CREEP

In considering alternative approaches to digital broadcasting policy, some Aspen participants sounded an important cautionary note. In an environment of abundance, policymakers must consider the future ramifications for other media of any policies they apply to digital service. While it is true that broadcasting is still the only universal medium, it is also true that two-thirds of American households have access to cable, millions have access to the Internet, and direct satellite broadcasting to the home is a growing industry. Digital broadcasting resembles cable in many ways: licensees can transmit multiple channels of television as well as other digital services. The Internet already has slow scan and full motion capability (although the latter is presently of poor quality due to bandwith limitations).

Given these similarities, what sense does it make to apply content regulations, either affirmative or prohibitive, to broadcasting and not the other media? Neither the scarcity, market deficiency, nor pervasiveness arguments for distinguishing broadcasting from other media apply as neatly as they once did, and it is not clear that the public ownership of the spectrum argument, even if relevant in the new environment, justifies regulation as opposed to spectrum fees.

If these arguments for distinguishing broadcasting are fraying at the edges, then why should we apply different policies to this medium than we do to cable, direct satellite service, and the Internet? If, for example, indecent language or deceptive advertising practices must be regulated on broadcasting, why should they not be regulated on these other media? People who use any medium can be exposed inadvertently to this type of content. Moreover, people who use any medium also have the option of changing the channel (or Web site). The same is true of affirmative obligations. If broadcasters must provide public service programming and high-quality children's shows, as well as serve their local communities in a non-trivial way, why should this not be the case for cable operators? And why should we not require the companies that sell Web browsers to construct home pages that prominently identify sites that will achieve traditional public service goals? In fact, why shouldn't the equal access and equal time requirements placed on broadcasters be applied to advertising on cable and on heavily used pages of the Internet, such as Web browsers? Would we be troubled if one of the political parties bought up all of the advertising space on Yahoo or Netscape?

One argument for maintaining a distinction between broadcasting and other media for policy purposes is the "dominance" rationale mentioned above. More people will be harmed if *broadcasters* are guilty of sins of commission or omission than if the same sins were committed by cablecasters or Web masters. This may be true, but if we worry about adverse effects on the broadcasting audience, it seems that we should worry about adverse effects on the audiences for other media as well, particularly because the latter audiences are large and growing very fast.

Another argument for distinguishing broadcasting is the "universality" rationale, also discussed above. Everyone receives broadcasting signals and can be helped or hurt by them. Making sure that broadcasting does a good job ensures that a modicum of public interest content is available to all Americans. This also is certainly true. But, as discussions of the "attention economy" indicate, simply making media content available does not mean that people will use it. Shouldn't we be concerned about the growing number of people who get most, or at least a large part, of their news, entertainment, consumer information, and children's programming from other media? Shouldn't we care whether they are well served? Can these other media still be considered "supplementary" to broadcasting at a time when they command at least a third of the market for television, plus a market for information over the Internet that is growing by leaps and bounds? Moreover, if digital broadcasters multiplex their signals, the audience for any one channel may be of about the size of the audience for a cable or satellite channel. Why should we care about protecting one small audience rather than another?

The answers to these questions are far from clear, as evidenced by the differences of opinion about whether or how to regulate non–broadcast media. Some people believe that we should impose at least some of the same regulations on cable, satellites, and the Internet that we now impose on broadcasters. By extension, their views imply that should have a policy for electronic mass media that does not distinguish between different media in most ways. We should see the relevant market or industry as one market or industry in which the different media are fungible: consumers do not distinguish between the different media in ways that are relevant to public interest concerns. Consumers see them all as mass media and use them interchangeably.

Many other people do not want to see the same policies applied to cable, satellite broadcasting, and the Internet that they would accept for broadcasting. The Supreme Court's refusal to apply to cable the public trustee provisions affirmed in *Red Lion* and its rejection of the Communications Decency Act provide powerful support for this school of thought. But anyone who wishes to distinguish broadcasting from other media must find a clear rationale for doing so, and it is not apparent that such a rationale has been articulated. What is clear is that such a rationale will be much harder to articulate with the advent of digital broadcasting in an environment of abundance, because one result of digital service is that broadcasting will resemble cable, direct satellite broadcasting, and the Internet in many more respects than it does today.

This is not necessarily an argument for either ending regulation of broadcasting or extending it to other media. It is a caution that anyone who wishes to place restrictions on digital broadcasting, or to extract some public interest value from it by means such as a spectrum fee, must seriously consider the possibility of regulatory creep. That is, they must consider the possibility that by regulating a medium that in many ways resembles other media, they will be setting a precedent that eventually helps to expand regulation beyond the service for which it was originally intended. If they have no difficulties with such future expansion or think the likelihood of it is small, then all is well. But they should think long and hard about whether they are comfortable with that prospect.

Ultimately what is most needed is a compelling rationale for asserting government power that explains why and how we should either distinguish among different media or treat them all the same for purposes of public policy. It is not clear that anyone has developed a rationale of either type that can command widespread assent in the era of media abundance. The Aspen Institute Working Group did not develop such a rationale. Someone should. Doing so would be an important contribution to the development of digital broadcasting policy as well as overall telecommunications policy for the decades to come.

In a background paper for the Working Group, Henry Geller argues that if digital broadcasters were charged a spectrum fee and the fee was used to support public interest content, broadcasting could come under the same jurisprudence now applied to cable.[58] This is an important start.

CONCLUSION

For many decades, policymakers saw the development of more abundant sources of television service as a solution to the First Amendment tensions created by broadcast regulation. If only the public had more options to choose from, they reasoned, the need for a government role in broadcasting would be greatly reduced. Now the era of abundance has arrived, and policymakers have found that they are still faced with many of the same dilemmas they have confronted for decades, as well as a family of new issues created by the convergence of media. Worse, the traditional justifications for broadcasting policy must be reconsidered. The quest today is not only to find new broadcasting policies, but also to find a new rationale for government policy toward the mass media as a whole.

Were policymakers naïve in the past? Are they wedded to archaic ideas today? Neither seems to be the case. Clearly the telecommunications industry is in the midst of a rapid transformation, and its future directions are unclear. Making policy in an environment of uncertainty is always hard. Some Aspen participants cautioned against a rush to judgment. Others were more willing to embrace a vision of the future. Policymakers will doubtless balance these two lines of thought. We can hope that they will not end up in a muddled middle.

But if those who advocated abundance as a solution to the problems of television policy were not entirely right, they were also not entirely wrong. The fact that so many Americans have enthusiastically accepted the new services is testimony enough that they advance the public interest in important ways. Viewing the public interest from the perspective of abundance prompts at least one thought with which most Aspen participants would probably agree: Any future policies should take full account of how the diversity of options now available to most members of the public furthers "the public interest, convenience, and necessity," and how the newer media might play an even larger role in furthering these goals. The development of policy for digital broadcasting should not be blind to the era of media abundance within which broadcasters operate.

The late Fred Friendly used to say that one of his goals was to make the difficulties of choice so painful that people had no recourse except to think. This may be among the greatest benefits that the era of abundance brings to policymakers concerned with the media today.

Endnotes

1. 47 U.S.C. Secs. 151, 336(d).

2. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386, 390 (1969).

3. For a discussion of technically created and government-created scarcity, their relationship and the implications of the distinction between them, see Tracy Westen, "Government-Created Scarcity: Thinking About Broadcast Regulation and the First Amendment," in this volume.

4. *FCC v. Pacifica Foundation*, 438 U.S. 726, 748–50 (1978).

5. As far as I can tell, the idea of "public ownership" as such is not stated in law. Rather, it is a longstanding expression of the fact that, beginning with the Radio Act of 1927, the government has successfully asserted the right to manage the spectrum as a comanon good. This shorthand description has taken on a life of its own over the years. See Glen O. Robinson, "The FCC and the First Amendment," *Minnesota Law Review* 52 (1967): 67.

6. See, for example, *CBS v. FCC*, 453 U.S. 367 (1981).
7. See, for example, *Policy and Rules Concerning Children's Television Programming*, 11 FCC Rcd. 10661 et seq. (1996).

8. 47 U.S.C. Sec. 336(d).

9. 47 U.S.C. 73.671; *Policies and Rules Concerning Children's Television Programming, Report and Order*, 3 Comm. Reg.(P&F) at 1395 et. seq.

10. For a discussion of the benefits of a market approach see Robert Corn-Revere, "Self-Regulation and the Public Interest," in this volume.

11. *Writers Guild of America, West v. ABC*, 609 F.2d 355 (9th Cir. 1979); *Writers Guild of America West v. FCC*, 609 F.2d 365.

12. Ultimately the law in this area stems from sixteenth-century English legislation and court opinions relating to charitable trusts and fiduciary responsibilities. See Marion R. Freemont-Smith, "Trends in Accountability," in *The Future of the Nonprofit Sector*, ed. Virginia A. Hodgkinson (San Francisco: Jossey-Bass, 1989), 75–78.

13. See Corn-Revere, "Self-Regulation and the Public Interest."

14. *Public Television: A Program for Action* (New York: Harper & Row, 1967).

15 *A Public Trust: The Report of the Carnegie Commission on the Future of Public Broadcasting* (New York: Bantam Books, 1967) 139–146.

16 Henry Geller, "Implementation of Pay Models and Existing Public Trustee Model in the Digital Broadcasting Era," in this volume.

Broadcasting Policy in the Digital Age

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INTRODUCTION

Broadcasting is currently undergoing its biggest period of change since the arrival of television. At the start of the 1990s, broadcasting in most countries was available on fewer than a handful of channels, satellite broadcasting hardly existed, and no one beyond a handful of research workers had even heard of the Internet, let alone thought that it had anything to do with television. Today cable and satellite channels are booming, digital television is beginning, and we stand on the verge of an Information Society with broadcasting, computing, publishing, and telecommunications technologies converging into a single media market. Indeed it has been argued that this change, which is occurring on a global scale, is the most significant development in communications since the introduction of the printing press by Gutenberg more than half a millennium ago.

The result of this change is that broadcasting is moving—and moving rapidly—into an apparently far more competitive and market-driven environment. A central question for broadcasting policy in all countries is therefore how well this burgeoning market will serve the public interest. Undoubtedly the extension of the market will expand choice and the increase in competition will put downward pressure on costs—both welcome developments. But will the market also foster a democratic environment, provide the information to which all citizens are entitled, and extend rather than diminish the tastes, experiences, and capacities of individuals? If not, how are these public interest goals to be achieved, especially in the more deregulated, open environment that the global revolution in communications is producing? In short, what should broadcasting policy try to accomplish and how is this goal to be achieved?

THE FUNDAMENTAL ARGUMENTS

The best way to begin to think about desirable policy goals for broadcasting is to address the fundamental arguments about the role of the market. The central claim made for the new technology is that television and radio programs *can be made and sold just like any other commodity and that this is desirable.* Note that this argument contains two separate propositions: (a) that programs can be sold commercially, and (b) that it is *desirable* that this should occur. Note also that the second does not automatically follow from the first. For example, it is perfectly *possible* to buy and sell babies, but most of us find this action morally repugnant and most countries have laws to prohibit it. This example may seem an extreme case, but it should not be assumed that this makes it an isolated one. In reality a multiplicity of situations exist in which society aims to *influence* the market so that people buy less or more of something than would otherwise be the case. Thus society tries to ban some products all together (e.g., unsanctioned drugs or child pornography). It tries to limit consumption of other products via regulation (e.g., the distribution of alcohol) and taxation (e.g., on tobacco). Society also encourages consumption by promoting the use of some goods through laws (e.g., the requirement to wear seat belts), subsidies (e.g., grants to promote energy conservation) and by direct public provision (e.g., health care).

The point about all these examples is that they remind us that while the market functions extremely well for allocating some goods, it does *not* do so for all goods. The essential public policy question is therefore "Does new technology make broadcasting just like many other goods that are sold successfully via the market, or does it have any special characteristics that make this either impossible or undesirable?"

The case *in favor* of thinking that broadcasting is just like other goods is almost commonplace. Peter Jay, in evidence to the United Kingdom's Peacock Committee more than a decade ago, said that he regarded broadcasting in the age of new technology as simply "electronic publishing." He therefore argued that broadcasting, once it came fully of age, would require neither any public service presence nor any regulation save that of maintaining standards of taste and decency.[1] The Peacock Committee was much taken with the analogy and in particular with the much more competitive environment that this suggested. Its report added historical comparisons with publishing, arguing that printing and publishing had been similarly fettered with unnecessary constraints when first invented, but had eventually been emancipated.

Such views have considerable appeal. However, this paper shows that, when the position is analyzed carefully, the goals that most people want from broadcasting will *not* be achieved by the market *on its own*. In particular this paper argues that the way in which both the issue of choice and the analogies with publishing have been formulated by the Peacock Committee, and by almost everyone else who has followed these lines of argument, are mistaken. As section three of this paper, "The Effects of the New Technologies on Broadcasting," shows, a degree of regulation continues to be needed, and this regulation can be—and *needs* to be—complemented by an important component of public service broadcasting.

A broadcasting market run on purely commercial terms would be undesirable for three reasons, discussed at length in section four, "Other Market Failures in Broadcasting"; section five, "Citizenship, Culture, and Community"; and section six, "Democracy and the Mass Media."

- **Market Failure and Quality**. Economic analysis suggests strong grounds for thinking that private markets in broadcasting, good as they will be in some areas, will fail on their own to produce the overall quality of broadcasting that consumers either individually or collectively desire. The two most important reasons why this happens are, first, that broadcasting can have adverse "external effects" (e.g., amplifying violence in society), and second, that good broadcasting is a "merit" good—just as with education or training or checking on their health, consumers, if left to themselves, tend to buy less than is in their own long-term interests.

- **Citizenship and Community.** The market, being by definition the mere aggregation of individual decisions, takes no account of community and of the complex relations between citizenship, culture, and community. In particular, the fragmentation of audiences that pure market-driven broadcasting may produce could undermine both communities and cultures by limiting our shared experiences.
- **Democracy and "Common Knowledge."** In a democratic society it is undesirable that the mass media should be entirely in private control (especially if such control is concentrated in few hands). Moreover, the creation and sustenance of "common knowledge" (what everyone knows that everyone knows) is a vital element in the functioning of democracy and that this "common knowledge" is not well guarded by commercial markets.[2]

A demonstration that purely commercial broadcasting would fail in a variety of ways does not thereby establish the need for public service broadcasting. It would still be possible, at least in principle, to regulate the market through a variety of rules. Section seven, "Rules-based Interventions versus Public Service Broadcasting," therefore, compares "rules-based" interventions with various forms of public service broadcasting, showing that some "rules-based" intervention would be necessary but not sufficient to achieve democratic goals.

Most important of all, section seven shows that in each of the three areas of concern (market failure and quality, citizenship and fragmentation, and democracy and common knowledge), public service broadcasting is a highly effective form of intervention. Moreover, it is a form of intervention that achieves what regulation cannot. In particular, the direct provision of public service broadcasting creates the possibility for a *positive* influence on the system (filling gaps, setting standards, and generating pressures towards high quality). As a result public service broadcasting can achieve ends that rules, by nature *negative*, never can. Finally, section seven also shows that rules-based intervention in the future would be less effective than in the past. The new technology thus increases, not decreases, the importance of public service broadcasting. Having set out the case for public service broadcasting, the paper turns in section eight to "Policy Suggestions" for the particular context of broadcasting in the United States.

THE EFFECTS OF THE NEW TECHNOLOGIES ON BROADCASTING

The impact of the new technologies in terms of the massive expansion of broadcasting channels is dramatic. All over the world countries which once had two, three, or four channels now find themselves having (or about to have) two or three *hundred* channels. Meanwhile, springing up alongside all this is the totally new world of the Internet, which brings with it the scope for interactive television and the capacity to order whatever program one wants, whenever one wants, wherever one wants.

Thus, so the argument goes, intense competition will arise between delivery systems, between channels, and between broadcasters. However, while it is correct that the number of channels will change in this way, it does not follow that the number of *broadcasters* will change correspondingly. When the situation is examined more carefully in terms of (a) production, (b) delivery, and (c) consumption, it is far more likely both that broadcasting will remain highly concentrated in the hands of few large owners and that particular consumers will become reliant on a *single* supplier. If so, for these consumers, it will be as if they were able to shop at K-Mart, but only at K-Mart.

Economies of Scale

Take *production*. Here two factors will generate highly concentrated broadcasting. First, both the making and broadcasting of radio and more especially television programs have exceptionally high fixed costs. At the same time they both have very low, in many cases zero, marginal costs. Almost by definition, to "broadcast" is to say that it costs no more to reach extra people. Economists describe this phenomenon as "economies of scale" and as the gap between "first copy" and "second copy."

When economies of scale are significant (i.e., when this gap is large), entry to the market is difficult and firms tend to be concentrated.

Against this position, some argue that the new technology is lowering entry costs and that the market will therefore become more competitive. With one exception (the Internet, which is considered below), this is true much less so than it first seems. It is true that the digital revolution is making cameras and recording equipment much smaller and in some cases cheaper (or more sophisticated for the same price). New technology has also allowed much simpler, and hence faster, processing and editing. It can even save on sets (for example by using computer-generated "virtual" backcloths). Nevertheless, the fundamental point is that most costs are not equipment but people—and not just individual people, but teams of people (writers, designers, performers, etc.) all working together. In aggregate these costs are considerable—especially for programs of any quality. For example, in the United Kingdom the *average* cost per hour of a BBC production is more than $150,000; a current-affairs program more than $200,000, and drama programs are about $750,000. Typical ITV costs are some 25 percent higher. Similarly, the fixed costs of transmission, whether in renting space on satellites, establishing digital terrestrial broadcasting facilities, or installing fiber-optic cables to the home, rule out all players except the very large. Indeed, when Rupert Murdoch entered satellite broadcasting, he told Andrew Neill that he was "betting the company on it."[4]

Most important is that for high-quality programs the real cost of *content* is rising not falling. All the discussion of technical change in the delivery of programs ignores the fact that *talent and desirable content is scarce.* Moreover, it is the technical change in delivery that is bringing this scarcity to the fore. The combination of more channels with multimedia companies that are increasingly operating on a global basis is generating far greater competition for services that are in short supply. In effect an economic rent (a payment for scarcity), which in the past was suppressed by the bargaining power of the small number of broadcasters, is now being revealed. For example, in the United Kingdom over the period 1990 to 1995 the average cost of the top one hundred contributors to U.K. television rose in ***real terms*** by nearly 7 percent per annum (or by more than 50 percent in total) and, on average, total talent costs for sitcoms, dramas, features, and documentaries rose by approximately 5 percent per annum in real terms.

Sports rights illustrate the problem even more dramatically. In the United States, the National Football League has doubled the money it earns from television rights in recent years and is expected to double them again within a year or so from now. The same phenomenon is taking place world wide. Formula 1 Grand Prix, which cost the BBC £2 million per annum during the years 1993–96, was sold to ITV in 1997 for £12 million per annum and in the same year the television rights to the Summer Olympics increased from £59 million to £165 million. In the face of such figures it is hard to take seriously the idea that broadcasting can be a world of small competitors.

Economies of Scope

The second factor generating concentration is that new technology creates not only economies of scale but what economists call "economies of scope." Such economies occur when activities in one area either decrease costs or increase revenues in a second area. New technology (in particular the digitization of all information and the convergence that this is making possible) is greatly increasing these activities. For example, newspapers and television stations have heretofore been separate activities. Today, information gathered for a newspaper can be repackaged as a radio or television program. Indeed, because digital information can be endlessly edited, copied, stored, retrieved, redesigned, and merged with other information, it can reappear in a multiplicity of formats. In short, the very same technology that *removes* spectrum scarcity *creates* concentration.

Strong evidence that economies of scope along with scarcity of good content will produce concentration of ownership can already be seen. In particular, the digital revolution and the convergence it is creating is a major cause of the extraordinary global rush to multimedia mergers observed in recent years. Every one of the top seven multimedia firms in the world has in the last few years been buying, merging, or being bought. In 1994, Viacom acquired Paramount and Blockbuster, creating a company with a turnover well over $10 billion. In 1995 Disney took over Capital Cities/ABC in a deal worth $19 billion. Time Warner responded in 1996 by bidding for Turner Broadcasting (owner of the world's largest film and animation library), generating a company with total revenues of $20 billion.

Nor has the action all been American. Bertelsmann, the largest European audiovisual company, with revenues of some $15 billion coming mostly from publishing, announced in April 1996 a merger of the TV subsidiary Ufa with CLT (Compagnie Luxembourgeoise de Telediffision), which will make the new company Europe's largest broadcaster; and both BSkyB and Kirch (one of the largest owners of copyright in Germany) have taken shares in DF1 (the first digital television service to be launched in Germany).

So powerful are the pressures towards convergence that even companies quite outside the multimedia world have been buying in. Seagram (the world's second-largest distiller) bought MCA from Matsushita in 1995 for just under $6 billion. In the same year, Westinghouse, primarily an electrical goods company, bought CBS for $5.4 billion and in 1996 bid $3.7 billion for Infinity Broadcasting. Similarly Phillips, the world's third-largest electronics company, owns 75 percent of Polygram, the world's number one music company (and maker amongst other things of *Four Weddings and a Funeral, Trainspotting*, and *Dead Man Walking*); Procter and Gamble (best known as makers of detergents) formed a strategic alliance with Paramount Television (owned by Viacom).[illegible] Concentration of ownership is therefore already a fact, not a speculation.

Delivery Systems and Gateways

Now consider *delivery*. It is clear here that the new technology is increasing the number of ways by which broadcasting can be delivered (by satellite, by cable, and by telephone lines). In addition, digital technology means that the number of channels that can be carried by *each* of these vehicles is also rising. Indeed, in the digital world, the concept of the channel might seem to be redundant—there is just a stream of bits which are first one program and then another. At first glance competition in delivery therefore appears to be a real possibility.

In practice, however, the very technology that makes competition look likely also creates the conditions for proprietary control. The two areas of greatest concern are the set-top box (or converter) and the browser. Both represent potentially extremely powerful "gateways." In the case of the converter (already used for analog TV by cable and satellite), in the future all digital signals will have to go through this. If programs remained free at the point of use (or "free-to-air" as it is called) the converter box would merely transfer digital signals to analog. However, for "pay-per-view" the converter will also control access (as it does now for satellite and cable) and make sure that payment occurs. These Conditional Access Systems and Subscriber Management Systems (as they are known) thus represent a new "gateway."

Moreover, digital technology will allow these gateways to be quite sophisticated. Once "channels," in the old sense, disappear, the gateway will be the means by which consumers select programs, using what are called Electronic Program Guides (EPGs). But these EPGs will do far more than select. They will soon allow access to a variety of "smart" features, such as automatically recording particular programs, or finding programs of a particular type and alerting the viewer. They may also become the means by which consumers "filter" programs, for example, by choosing only to receive programs that are below a certain rating for violence or sex or whatever. All of this technology will sit in a single box (a box that will soon be incorporated directly into the TV) and, via an "applications program interface" (or API), this box will control the television.

The importance of these gateways is seen most clearly when we consider the *consumer*. The idea that customers will buy two or three aerials and/or two or three converters is totally unrealistic. What consumers want is a single system offering the widest possible choice. Despite the increase in the number of delivery systems, then, there will be one single point through which every digital channel from every broadcaster has to pass. Moreover, any incumbent firm has large advantages (because consumers will not want to lay out twice for a converter). On top of this, there is a further advantage from having an established Subscriber Management

System. There is nothing technologically complicated here, just (yet again) high fixed costs and low marginal costs providing natural barriers to entry. Finally, anyone who controls the gateway also controls the agenda—what you see when you first switch on, where it is easiest to go next, what is drawn to your attention (and what is not), and what your TV goes to as its "default" setting.

Although so far little discussed, this power over the agenda may ultimately be the most important. As already noted, once digital television arrives, "channels" will no longer exist. This is because many programs may share the same spectrum. As a result viewers will need to select what they watch by using their hand sets and picking programs from the display on the television (the EPGs). In the age of the Information Superhighway, when activities as diverse as shopping, banking, visiting an estate agent, consulting your doctor, or taking your degree may all start (and in some cases end) with the TV, will consumers think it wise that the initial menus of choice should all be under the control of a single commercial firm? Of course, and especially with careful packaging, some consumers might not realize that this was the case, but the policy issue facing society would still be present.

This control over the gateway is, of course, precisely the problem with Microsoft's Internet browser. As this case is now before the courts little further will be said here. Nevertheless, the nature of the policy dilemma is perfectly clear. On the one hand, Microsoft has been extraordinarily commercially successful. In addition, as part and parcel of this success, it has produced substantial innovation and, by virtue of its size, it has been able to promulgate standards that have allowed consumers to move from application to application and from computer to computer with ease. On the other hand, Microsoft is now clearly the incumbent and it is arguable that it has enormous potential power both to influence the consumer and to resist the entry of other products.

Indeed, so all pervasive is the Microsoft software that it can be argued that Microsoft has the capacity not only to influence what the consumer most easily finds, but even how the consumer "sees" the world. Microsoft's Word 98 software, for example, accepts without question the names "Gates" but not "Murdoch," and "Microsoft" but not "Netscape"! Of course, these types of preferential treatment are so obvious that they will be overridden by almost everyone (or the spell-checker turned off), but many other less obvious examples could be given that most people will not bother to add to their dictionaries (and most people will not want to forego the other benefits of the spell-checker). As a result, words not "approved" by Microsoft will just be avoided and ultimately dropped from the language. In a similar vein, if a search is done on Microsoft's Encarta 95 for "civil war," the uninformed could easily form the impression that the only civil war that ever occurred was in the United States. Moreover, even more striking is the result of searching for "Christian Democrats"—the largest single political party in Europe. The term does not exist! Again, there is nothing to stop anyone from consulting other sources, but the reality is that many will not do so. The point of these examples is not that Microsoft is *intentionally* trying to mislead, but that in the fields of information, knowledge, and culture, dominance must be rejected on much deeper grounds than those of industrial economics.

The Internet

So far it has been argued that the characteristics of production, content, and delivery all suggest strong underlying pressures towards concentration and monopolization. However, today's Information Superhighway (in the shape of the Internet) appears to offer a counter-example. Millions of people are placing information on it every day and even greater millions are using it to retrieve information. It is therefore not at all monopolized. *However, far from this being counter-evidence, this is—at least so far—the exception that proves the rule.* The Internet is not currently monopolized (with the possible exception of the browser, as discussed above) for three key reasons. First, the system was developed primarily by university research workers totally committed to creating an open system—the whole philosophy of the Internet is that it should be capable of connecting to all systems anywhere.[8] Second, until 1994 academics users predominated, and entry for them was particularly easy as most of them have their fixed costs supported by public funding. Third, and most important, the great majority of the content on the Internet is extremely cheap to produce. This is because the cost of collecting some kinds of information (most obviously personal information or personally created information) is very low, and because, psychologically, people appear to value self-promotion and/or participation (so labor costs are zero). But—and this is also central—being cheap, much of the content available on the Internet is of abysmal quality.

Of course, there is some good material on the Internet, but the majority of the material that is of better quality is there either because it has been well-organized to attract advertising or because it has been produced by public or quasi-public bodies (universities, libraries, museums, etc.). Most of the rest is poor precisely because it is cheap and because most of the new sources are not embedded within any stable institutional framework and/or are without the implicit codes of professionalism that characterize existing reputable sources of information. Indeed even governments frequently fail to specify when the information was first posted or when it was last revised. Much of the information on today's Information Highway is therefore misleading or hard to understand. There are, for example, hundreds of "home pages" that have been left abandoned and many others where anyone with specialist knowledge can easily see that lists of information are incorrect, incomplete, or out of date. As David Clarke of MIT (one of the architects of the Internet) has remarked, what is needed now is a layer of "editorship"" to help users make sense of the "information soup."

In short, the great majority of the Internet's content is at the opposite end of the spectrum from mass-market, high-quality multimedia broadcasting. In the digital age, both the Internet and traditional broadcasting can, *just*, be described as "electronic publishing." However, this catch-all phrase fails to draw the important distinctions between the two: The Internet is personally addressable, usually received in private, and is low cost and frequently low quality; television is broadcast to a mass market, often received in public, and if it is to be of high quality, will have high fixed costs. Of course, there are already intermediate cases (such as CD-ROMs), and the new technology will spawn more, many more, but to say that we cannot therefore distinguish one from the other is as unhelpful as saying that because night shades imperceptibly into day we do not know the difference.

It should also be noted that we do not know how the Internet will develop. At the moment the multiplicity of sources predominates. However, already the organization of the Internet Service Providers has changed dramatically with the emergence of a small number of large players (such as America Online). Moreover, the growth of Intranets and the continuing pressure from economies of scale and scope in the collection, organization, and dissemination of high-quality information may apply to the Internet almost as much as to traditional broadcasting. It is, for example, clear that some sites on the World Wide Web are already beginning to become better known than others. In this case the Internet itself might need to be thought of as two separate parts, one being somewhat like conversations on the telephone and one being somewhat like broadcasting, but with a reply channel thrown in. What is more, this development looks more likely as the Internet develops different levels of service; low bandwidth (plus heavy congestion) is fine for e-mail, but, even with compression, high bandwidth is essential for multimedia.

Dilemmas for Public Policy: Concentration and Fragmentation

Whatever the outcome for the Internet, the central point, true both of today's broadcasting and tomorrow's Information Superhighway, is that *high*-quality multimedia content is expensive to produce in the first place and yet, once commissioned and created, is relatively cheap to edit or to change and trivially cheap to reproduce. In other words, as already stated, it has high fixed costs and low marginal costs—and these are the natural creators of monopolies.

Here we have a critical dilemma for public policy. High-quality material can still be produced and yet cost very little *per unit* provided that it reaches a large number of people (exploiting economies of scale) and/or provided that it is used in a wide variety of different formats (exploiting economies of scope), but the exploitation of these economies of scale and scope imply concentration of ownership. Thus, even though the new technology has removed one source of monopoly, spectrum scarcity, it has replaced it with another, the natural monopoly of economies of scale.

Another dilemma follows logically from the combination of economies of scale and scope on the one hand and a constrained audience on the other. The provision of more channels has not meant that more time is being spent watching television. Both in the United States and elsewhere, the number of hours watched has remained remarkably stable (if anything falling slightly). In the United Kingdom, for example, the number of hours watched per person per week in 1995 was twenty-five. This is *identical* to what it was in 1980, before the arrival of Channel 4 or cable or satellite. Thus more channels fragment audiences. The inevitable consequence is that the audience per channel or program falls and, given economies of scale, the average cost rises.

This relationship between choice and cost is not true for most goods and services that are allocated via the marketplace. A larger choice of restaurants or shoe shops or hotels does not lead to higher costs; in fact, frequently the opposite occurs as competition pushes costs down. The difference between these goods and services and broadcasting is that the former has much smaller fixed costs and variable costs are also significant. Thus minimum cost production is quite small, whereas minimum cost production in broadcasting is large. The result is that *choice has a cost in broadcasting*—a cost, moreover, that is not normally faced elsewhere. Under "free market" conditions consumers will face a choice between a narrower range of cheaper (and yet still high-quality) broadcasting and a broader range of more expensive and yet lower-quality programs.

The obvious response from those who advocate the expansion of commercial TV is that this is a choice that should be left to consumers. Why do otherwise? If some consumers want lots of choice and the consequence is that they pay more and yet, on average, receive lower quality, is that not up to them, and does the market not correctly reflect their wishes? Surprising as it may seem, analysis suggests the opposite.

The reason that individuals' choices via the market do not capture individuals' wishes accurately is because of "externalities," the effects of one person's purchase on someone else.

the existence of which the market ignores. The effects may be either harmful, as in the case of traffic congestion arising from private car use, or beneficial, as in the case of vaccinations—everyone benefits from the fact that other people are vaccinated. The existence of externalities means that left to itself the market produces too many car journeys and too few vaccinations (which is one reason why petrol is taxed particularly heavily and why there are public health programs for vaccinations).

In the case being examined here, externalities arise because the person who migrates away from existing channels in favor of others imposes a cost on all those who do not move, a cost that the mover does not have to pay, and so does not take into account. The situation is analogous to that of membership in a club. Clubs have common facilities, the costs of which have to be shared. As a result, if someone leaves, all the remaining members face either higher charges or worse facilities or both, a less than optimal outcome. If the members who remain were able to organize themselves, they would all be willing to offer the potential leaver a sum just below the extra costs that they would otherwise face in order to try to persuade the potential leaver to remain. If such side payments were on offer, fewer people would decide to leave. However, in broadcasting it is impossible to organize in this way because it is too expensive to find and communicate with potential leavers (they are numerous, unknown, and uncontactable). As a result, a pure free market in broadcasting would be biased in favor of too much fragmentation of audiences (and, at the same time, too much concentration of ownership).

In the case of the United States, this particular dilemma is much less sharp than in other countries. The scale of the U.S. television market has meant that multiple channels have still been able to attract large audiences. Thus, in most cases, the effective cost per viewer has been lower than elsewhere. However, while this argument is true in general, it does not apply with the same force to public service broadcasting *precisely because public service broadcasting has been such a low volume activity in the United States.* Even in absolute terms, the total expenditure on public broadcasting in the United States is less than one eighth of that spent in Japan or the United Kingdom.[9] In other words, if the United States wants high-quality public service broadcasting (as the remainder of this article argues it should), then it should not try to combine this with a proliferation of public service channels.

OTHER MARKET FAILURES IN BROADCASTING

Consumers and Market Failure

Another set of "externalities" apply to broadcasting more than to most other goods and services. These are not the direct result of fragmentation, but, like excessive fragmentation, they also threaten quality. These externalities exist once we suppose, as both common sense and research suggests, (a) that television has some influence upon the lifestyles, habits, interests, etc., of those who watch it, and (b) that these habits, tastes, interests, and sympathies have implications for those around us. Indeed, even just the *belief* that television affects behavior is sufficient for externalities to exist. Elderly people may become more fearful of walking down the street at night if they believe that the portrayal of large amounts of irrational violence on TV encourages such behavior, irrespective of whether in fact it does or not; the possible falseness of the belief does not alter the genuineness of the fear. In other words, the television that is broadcast ought to reflect the preferences not only of those who watch it but also those affected by it indirectly—yet the market cannot do this. It follows that, if left just to the market, more "bad" TV (bad in the sense of being judged to have harmful side effects) and less "good" TV will be purchased than consumers in aggregate would have wished could they have acted collectively.

A further reason why a broadcasting market would not work as well as one for many other goods and services is that markets do not work well where what is being sold is information or experience.[10] People do not know what they are "buying" until they have experienced it, yet once they have experienced it they no longer need to buy it! Of course it can be argued that in such information-based markets, consumers are often willing to experiment by paying for the right to access a bundle of information for the chance that some of it might prove useful. But this argument does not remove the problem. If the correct long-run choices are to be made, the cost of the initial experiments should be only the marginal cost of disseminating the information, and in the case of broadcasting this is zero.[11]

Third, and most important, the theory of choice on which the *economic* claim in favor of a free market in broadcasting rests relies on a fallacious assumption. This theory assumes that consumers *already know* their own preferences. Indeed it operates as if people arrive in the world *already fully* formed. Strictly speaking, such an assumption is false everywhere. Nevertheless after a period of time, it may be a reasonable assumption for some goods and services—people undoubtedly do have different tastes and they can *find out* by experiment what meets their tastes. However, in broadcasting such an assumption is seriously flawed. Much of broadcasting exists to inform and educate us, but the process of learning and understanding the world is part of how our preferences are *formed*. They cannot therefore be taken as given in advance.

Those who advocate a free market in broadcasting discount both this and the preceding argument (about the costs of information) on the grounds that television—unlike, say, a pension policy—is purchased every day, so any mistakes that a consumer may make can be quickly corrected. That much is true, but what is at issue here is both more subtle and more important. The point is that in the particular case of broadcasting, consumers may be unavoidably myopic about their own long-term interests. Consumers cannot be other than ill-informed about effects that broadcasting may have on them, *including effects on their preferences about television itself*. Moreover, such effects may well be spread out over a period of years after the present reception of broadcasting.

The point being made here is not that television may have great power for good or evil over society as a whole, but that television has the capacity either to cramp or to expand the knowledge, experience, and imagination of *individuals*. Television fictions, for example, as J. Mepham notes, "can expand the viewer's sense of what is possible and enhance his or her vocabularies and repertoires of words, gestures, and initiatives . . . *only if they are of high quality*."[12] In other words, if all television is elicited by the market, there is a very real danger that consumers will under-invest in the *development* of their *own* tastes, their *own* experiences, and their *own* capacities to comprehend. This is not because consumers are stupid, but because it is only in retrospect that the benefits of such investment become apparent.

In technical terms, good-quality broadcasting is what economists call a "merit" good, analogous to eating sensibly or receiving preventative health care. No matter how much someone tells us in advance that we need it, the evidence is that, in general, we under-invest in it. In a free market in broadcasting, where each item would have to be paid for at the point of use, this tendency to under-invest in watching those programs that did not attract us at that moment would be greatly (and mistakenly) increased.

Market Failures in Production

The danger that market-driven broadcasting will lead to concentration on the side of production has already been discussed, but there are two more general problems. First, it is well recognized by economists that pure market economies will under-invest in training. This is because each firm tends to "free ride," buying in talent as it needs it. Such behavior is rational for each firm, but not for the system as a whole. In countries such as the United Kingdom with large public service broadcasters (PSBs), this flaw in the market—at least in the case of broadcasting—has been solved by the presence of bodies such as BBC. The PSBs have acted as "talent conveyor belts," attracting many of the best staff early in their careers, training them well, and then allowing the benefits of this training to spread throughout the broadcasting industry. The solution in the United States has to be found elsewhere, but if the United States wants high-quality television—including high-quality public service television, where the skills and implicit values are not necessarily identical to those of the commercial sector—the solution has to be *found*.

Second, there is some evidence that in countries such as the United States and the United Kingdom, which have highly developed financial markets, firms take too "short" a view, have not innovated sufficiently, and have given insufficient attention to quality. The explanation of these failings is complex, but one factor suggested in research is that the structure of these financial markets places an undue premium on corporate control. The result is that U.S. and U.K. firms are forced to pay higher dividends than their competitors abroad in order to resist the threat of takeover and that these high payouts reduce investment.

For present purposes, what matters about both of these arguments is that they suggest a case for some degree of publicly funded support for investment in general and for training in particular in order to correct these market failures.

Market Failure and the Interaction of Consumption and Production

The possibility of a purely commercial broadcasting market failing to provide everything that individuals in society ultimately want is still more worrying when the interaction of production and consumption is considered. It has been suggested above that in a pure market system, consumers will fragment more than they really wish, will buy fewer good programs than is collectively desirable, and that may under-invest in their own long-term development because the beneficial effects are only recognized in retrospect. It has also been argued that private-sector broadcasters are likely to take too short a view, under-investing in training and in the production of good programs.

Given these undesirable effects, it is easy to imagine further adverse feedback effects. If consumers fragment and prove unwilling to pay the higher prices that good programs will then require, because they are unaware at the time either of the longer-term benefits to themselves or to society, then broadcasters will not have the incentive to invest in producing such programs. Conversely, if broadcasters are not providing good programs, even well-informed and far-sighted consumers cannot buy them. To this situation may be added the possible external effects from one broadcaster to another via the consumer: individual broadcasters may well consider their own (good) programs not commercially worthwhile unless other broadcasters are also transmitting good programs that are gradually extending consumers' tastes.[14] Putting it bluntly, a danger exists that the market on its own will "dumb us down."

These theoretical concerns find support in practice from the experience of other countries. Admittedly, there is, as yet, little *direct* evidence about exactly how a fully commercial system based largely on pay-TV would operate, as no country has such a system. Even those with pay-TV and dominated by commercial sectors gain by far the greatest part of their revenue from advertising. Nevertheless, the inferences that can be drawn are not encouraging. Countries with a low element of public service broadcasting typically display poor quality, concentration of ownership plus frequent battles over ownership, flouting of regulators' rules, and more or less subtle forms of government interference.

In France, for example, Canal Plus was launched in November 1984 as a subscription channel, but only six months later it was in financial trouble and so was allowed to accept advertising; as J. Forbes notes, "[i]ts major shareholder is the state-owned advertising company Havas, whose chairman . . . has been a close friend and associate of François Mitterrand since 1950."[14] Although Canal Plus later became profitable, La Cinq, launched in 1986, filed for bankruptcy on New Year's Eve 1992—and this in spite of offering quality news at one end and late-night soft porn at the other plus financial support from Silvio Berlusconi. Moreover, with four new channels opened since 1984, it was found, according to Forbes, that "[b]etween 1983 and 1988 the number of game shows screened jumped from four or five to fifteen or sixteen a week, . . . the amount of light entertainment doubled [and] the number of feature films quadrupled."[15] The *Financial Times* described the effects of deregulation on French television as having heralded "an anarchic scenario of dozens of different channels pumping out soft porn and pulp programming punctuated by virtually unrestricted advertising."[16]

Experience in Germany and Italy offers similar warnings. German pay-TV appears to contain large amounts of pornography. In Italy, on the face of it, there is intense competition among well over thirty local channels. However, in practice, virtually all of them are controlled by Fininvest (owned by Silvio Berlusconi), and the Fininvest channels have been much criticized for their down-market programming (consisting of some 90 percent entertainment and with over 50 percent of their total programming imported from abroad).

The case of the United States itself is the most interesting, as the United States has the largest commercial broadcasting in the world—both proportionately and absolutely. However, as already noted, because of its size the United States is a special situation. As a result of its vast market it faces less of a problem from the higher unit costs that accompany a proliferation of channels. In the United States, channels can increase and yet the audience size per channel can still be high, so the tradeoff between choice and quality is less severe that it will be for countries with smaller audiences.

The result is that, in the United States, the move from a system with a small number of channels almost all financed by advertising to a multiplicity of channels and an expansion of pay-TV (both subscription and per program) has genuinely extended choice. It has increased diversity, provided more (and better) news coverage, and extended significantly the range of sports, music, language, education, weather, travel, and other special interest channels.[17] This is exactly what economic analysis would predict. Advertising inevitably concentrates on the mass, middle-income, market. Audience size, not how much the audience values the program, is what matters. In addition, as channels multiply, the incentive to look at minority interests rises. When only two channels exist, they will both locate near the middle of the market and try to acquire 51 percent of it; when, say, ten channels exist, it becomes worthwhile to focus on a group that only constitutes 10 percent of the population. Television financed by pay-per-view is therefore far better than television financed by advertising at reflecting consumer wants.

Such observations, showing an improvement over time within the United States, are not, however, at odds with the argument above that a purely market-driven system will fail in important ways. While the U.S. market undoubtedly offers considerable choice, few would say that it offers television of such high quality as that of the United Kingdom, Australia, or Canada where there has been a much stronger contribution by PSBs. "Dumbing down" is all too prevalent.

Moreover, even with its large market, the United States has only relatively recently begun to develop its own significant original productions for cable channels; its public service broadcasting (reaching only about 3 percent of the audience) has had to rely heavily in the past on importing programs made abroad (especially from the United Kingdom).

More serious is that the United States provides little good broadcasting for children, and what does exist relies on advertising, or, worse still, on *insidious* advertising either via "infomercials" or by producing shows based on a toy (e.g., "Care Bears," "He-Man," "Transformers," "GoBots," and "Masters of the Universe"). As E. M. Noam comments, "The most successful channel for children is Viacom's Nickelodeon, which has 30 percent of the viewing time of 6–11 year olds. . . . [I]ts programs are more entertaining than educational."[18] And as B.P. Lange and R. Woldt note, the United States is also thought to have provided only a "continuing narrow scope for political information."[19]

U.K. experience, in contrast, with a strong public service presence and ethos, is widely acknowledged to have much good-quality broadcasting and to have raised the quality over time. In his study of broadcasting in the 1980s, Tim Madge refers to the extent to which the television program-makers have enhanced the sophistication of their audiences so that "programs are made which simply could not have been 'read' correctly a few years ago."[20] Of course the high quality of British television is partly the result of good ITV programs. However, the context is crucial. Madge points out that as "ITV executives admit, without the BBC as a constant reminder—and threat to their audiences—the best ITV programs would be rarely made. Producers in commercial television unashamedly use the BBC to argue their case for the equivalent of public service programming."[21]

The Company We Keep

These points about quality can be made another way. In many aspects of our lives, we readily recognize that the environment within which we live and the people with whom we work can have an enormous influence on what we do, or do not, achieve. To take just a few examples: everyone wants children to go to high-quality schools, sports teams to have the best coaches, and firms to learn from best practice world-wide. Yet is not television part of the company we all keep?

People in all countries of the world watch it for very high proportions of their weeks. In the United Kingdom, the BBC estimate that, including radio, the average household spends more than a quarter of all their leisure time watching or listening to the BBC. Moreover, children watch it more than the average. So also do households with children. It is impossible to know precisely what effects this has since it is not possible to run the experiment of what a society without television would be like. Nevertheless it seems inconceivable that broadcasting has anything other than a powerful effect.

As Robyn Williams, Australia's foremost producer of popular science programs, comments when discussing the effects of down-market broadcasting, "Of course the Popzonk/Newzak/Blisscomb culture need not go hand in hand with a world marooned somewhere in Mad Max country. But somehow I seem them together. It is likely that the broadcasting (the *communication*) system we choose for our future world will come wedded to certain social values, demonstrating, perhaps, what kinds of communities we want to enjoy in the next century."[22]

CITIZENSHIP, CULTURE, AND COMMUNITY

The argument, so far, has been that there is a case for public service broadcasting so as to make good the deficiencies of the market in providing what well-informed *consumers*, acting either individually or in aggregate, would wish to buy over the longer term. A quite separate argument arises from the fact that there are parts of our lives to which the market is simply not relevant. To be more concrete, we watch television and listen to the radio, not just as consumers, but also as *citizens*.

Our citizenship carries with it three separate implications. First, as citizens we have rights. This includes the right to certain core information about our own society. Thus almost everyone would agree that anyone is entitled to *know without having to pay for it* such basic things as the key items of news, their legal rights, who their Member of Congress is, etc. It is immediately obvious that the market makes no provision for this (any more than it does for basic education or primary health care for the poor). Moreover, there is a danger that, in the absence of appropriate public policy, the new technology of the Internet and Intranets will create a world in which there is high-quality commercially provided information but only poor-quality information in the public domain. In this new context the informational role of a public service broadcaster operating universally is therefore more important than ever. As the local public library declines, so the public broadcaster must fill the gap—and for zero charge at the margin.

Second, as citizens we have views about society that cannot be captured just in our buying and selling. In particular, in a wide-ranging investigation carried out in 1994 and 1995, the Bertelsmann Foundation working with the European Institute for the Media found that in all ten countries covered by its study people expected and wanted "socially responsible television."[24] Moreover, they concluded that "responsibility in programming has a chance only if and when it has been defined and constantly pursued as a strategic aim in the management [of the broadcaster]."[25] It is difficult to see how both profitability and responsibility can be constant strategic aims at the same time. In the competitive marketplace profitability is bound to take priority.

Third, as citizens we are members of a community. It has been said that while we are all individual we are also all individual *somebodies*. In other words our sense of our own identity derives from how we see ourselves in relation to society and where we "locate" ourselves within it. Stated simply, there is intrinsic value to individuals if they have a sense of community—to be alienated is literally to lose a part of oneself.

The crucial importance of broadcasting in this context is that for the great majority of people it is today their major source of information about the world beyond that of family, friends, and acquaintances. Television provides not only the hard facts, but also the fuzzy categories—the social, ethnic, psychological, etc., concepts within which we must make sense of the world. It also supplies a set of fantasies, emotions, and fictional images with which we construct our understanding (or misunderstanding) of all those parts of society beyond our immediate surroundings. It is therefore part not just of how we see ourselves in relation to the community, or communities, within which we are embedded, but also part of how we understand the community itself—and indeed part of where the very idea of community arises and is given meaning.

The general importance of community and of a common culture to the well-being of a society and its citizens is widely recognized. Culture and community provide a common frame of reference in terms of which to comprehend the history, present, and future of one's society and of one's own place within it, and so to make sense of the decisions one has to take both as an individual and as a citizen. Moreover, the texts, practices, and traditions that make it up function as sources of aesthetic and moral understanding and empowerment, as well as providing a focus for communal identification.

There is little doubt that in today's society the viewing of television is part of what creates any sense of commonality that we may have. This is true as much of low as of high culture. The latest episode of a soap opera or a recent football match can function as a topic upon which all members of the society can form an opinion or converse with one another regardless of the differences in their life-style, social class, or status group. Given that any society must embody such sociocultural differences, the value of a community where people have things in common and can interact on that basis is or should be obvious. Indeed the winning of the World Cup by France in 1998, watched on television by almost the entire nation, is already being credited with a more tolerant and inclusive approach to the immigrant community in France. Commonality has generated the overlap from one community to another.

The value of commonality, the value of shared experience, the value of self-identity, and the value provided by non-stereotypical portrayal of other cultures are not considerations that do, or could, enter into the transactions of the marketplace—but they are values nonetheless. For all of these reasons there is a case for public service broadcasting, one of whose objectives would be the provision of those broadcasts to which we are entitled as citizens.

Fragmentation

This general point about commonality takes on added importance as well as a different form in the context of a pluralist society, such as the United States in the late 1990s. As the processes of technological, economic, and social change increase in rapidity, traditional forms of social unity can break down, and new subcultures based on partially overlapping but less widely shared and equally deep commitments to certain forms or styles of life (ones based on class, region, religion, race, sexual orientation, and so on) can proliferate. To this must be added the near certainty that a "free market" in broadcasting based on an abundance of channels would itself fragment audiences and, by so doing, increase the sense of separateness. In such a context, the risks of sociocultural fragmentation are high, and so is the value of any medium by means of which that fragmentation could be fought.

As technology fragments the market, it is therefore entirely appropriate for U.S. public service broadcasting in the 1990s to contribute towards the (re)construction and maintenance of a common national culture—not a single dominant culture, but a set of shared values that are accommodating enough to accept on equal terms as many as possible of the minority group cultures that go to make up such a pluralist society, and thereby minimize its tendency towards fragmentation. What would be shared by the members of such a culture would *not* be belief in a particular form of life, but rather an understanding of the lives of other citizens, together with a shared acknowledgment of their worth or validity. And it is this latter requirement that specifies the sense in which the various subcultures are accepted within (form part of) a common culture on equal terms with one another.

The importance of one or more public service broadcasters in this process would be that by broadcasting informed and accurate representations of minority cultures, they would help to maintain the culture's shared emphasis upon respect for human life—it would do so by disseminating the knowledge that forms the essential basis for acknowledging those aspects of the minority cultures that make them worthy of respect. Indeed in modern society, the key way of ensuring the legitimation of a given subculture by conferring a public profile upon it is through television.

One final area under the heading of citizenship and community where a public service broadcaster might play a special role is in the broadcasting of national events. Here, the idea would be that a public service broadcaster should be given the responsibility to broadcast events which, going beyond questions of purely subculture-specific interests, are of genuinely national interest. The events in question would include happenings anywhere in the world that are of significance to virtually anyone (e.g., the collapse of the Berlin Wall) or to the United States in particular (e.g., the U.S. athletics team in the Olympic Games), as well as events in the United States that are primarily of importance to its citizens (e.g., the inauguration of the president). The idea would not be to stop the commercial stations from covering such events, but to ensure (especially as we move into pay-per-view) that events which are constitutive of citizenship are also available free at the point of view. Such broadcasting would help to maintain a sense of national identity that transcends more local communal identifications and allows individuals to understand themselves as members of a particular nation.

DEMOCRACY AND THE MASS MEDIA

It is a basic principle of democratic society that votes should not be bought and sold. This alone is sufficient justification for broadcasting not being entirely commercial. As President Clinton put it, "Candidates should be able to talk to voters based on the strength of their ideas, not the size of their pocketbooks."[25] By the same token, broadcasting should not be directly under the control of the state. There has to be a source of information that can be trusted to be accurate in its news, documentaries, and current affairs programs and to be impartial among differing social and political views. It is a necessary, but not sufficient condition, for this to be possible that some at least of the broadcasters be independent of any political party and of any business interest.

It is not enough, however, for truth to be upheld. It must also be available—and available to all. In other countries with strong public service broadcasting traditions, it is fundamental that they are *nationally available* and *easily accessible*. Moreover, their tradition of dedicated public service provides the basis for trust without which much information is just propaganda; and their independence from governmental and commercial or marketplace pressures has, on the whole, made it more capable of representing unpopular or otherwise unpalatable truths.

These arguments are not, however, absolute ones, but contingent upon behavior. A number of supposedly "public service" broadcasters have been little more than mouthpieces for the state. The reputation of the PSBs is not therefore automatic—they have to continue to be *earned.*

On the other side of the coin, it should also not be assumed (as it often is) that commercial broadcasting is necessarily freer of politics than public service broadcasting just because one is public and one is commercial. In France, the close connection between Canal Plus and Mitterrand has already been noted. In Italy, the interventions have been far more blatant. In the March 1994 elections, Berlusconi used his three TV stations reaching 40 percent of the Italian audience to give unremitting support to his own political party, Forza Italia, and the wider grouping of the Freedom Alliance. Subsequent research showed not only that there was a bigger swing to the right (3.5 percent more) among Berlusconi viewers than in the electorate in general, but also that this swing could not be explained by the fact that viewers of Berlusconi channels were *already* more right wing. Viewers of these channels were found to be middle of the road and only shifted their voting *after* watching the Berlusconi channels.[26] Then, of course, after the election, the government *was* Berlusconi and in the referendum on whether Berlusconi should be obliged to sell off two of its three TV networks, Fininvest used its networks to support the "Vote No" campaign. Fininvest carried 520 spots for the Vote No campaign as compared with only 42 for the "Vote Yes" campaign, which was effectively forced off the air because its slots were placed in such disadvantageous positions.[27]

Common Knowledge

So far the arguments about the relationship between the mass media and democracy strongly reinforce the case for public service broadcasters existing as major sources of independent, accurate, and impartial information. However, the ideas of accurate information and of impartiality need to be seen in a wider context. Although it is not often recognized, society depends critically on the existence of "common knowledge"—what everybody knows that everybody knows. Most of the time the existence of such knowledge is taken for granted. However, it plays a role in society that is both more profound and more important than at first it seems.

The influence of common knowledge is more profound than it might seem because *any* debate requires some common knowledge—at a minimum, it has to be agreed upon what is being debated. Moreover, in modern societies the media is one major way in which common knowledge is *created*. The influence of common knowledge is also more important than it might seem because almost all solutions to problems require the *extension* of common knowledge. In order to be *agreed upon*, solutions have to be based on a common understanding of the situation. Common knowledge is therefore a *precondition* of many coordination problems in democratic societies.

Agreeing on solutions and agreeing on correct solutions are not, however, the same thing. Or to put the same point another way, knowledge, which implies that what is known is true, is not the same as belief, which may or may not be true. The "power of the witch doctor" may have been thought of as common knowledge, but strictly speaking it was only "common belief." Another more contemporary example that displays both the power of the media and the danger and inefficiency of inaccurate "common knowledge," if that contradiction may be used, comes from the experience reported by the British Labor Member of Parliament Dianne Abbott. When visiting a school in the United Kingdom she asked what number the pupils would dial in an emergency. The answer from many was "911"—yet the U.K. emergency number is 999!

This example also illustrates that "knowledge" and "information" need to be understood as including much more than is dealt with by news programs. It also covers the discussions of news, trends, and images that are to be found on radio phone-in shows, chat shows, and so on, as well as the scientific and cultural matters typically dealt with by programs such as those on the Discovery channel, not to mention the lifestyles presented in so many contemporary fictional creations.

Furthermore, central to the idea of the democratic society is that of the well-informed and self-determining individual; but, if individuals are to be genuinely autonomous, it is not sufficient for them merely to receive information (no matter how much and how impartially presented), they must be able to *understand* it. They must be able to make sense of it in ways that relate to their own lives and decisions. Neither facts on the one hand nor opinions on the other (although both are important) are sufficient; for neither are utilizable by those who absorb them unless they are made the subject of reasoned analysis—unless, in other words, they are not merely transmitted but presented (organized and submitted to informed and coherent criticism from as many perspectives as possible) in a way which allows them to be understood and thereby incorporated into the audience's own judgments. Information without "organizing insights" is just noise.

The media has therefore a double responsibility. First, programs need to handle information in such a way to increase understanding and create knowledge. Second, programs need to ensure, as far as possible, that such knowledge correctly represents the world as we know it.

It is worth noting here the sharp contrast between talk shows on commercial and on public service channels. In April 1996, the New York radio station WABC fired a talk-show host named Bob Grant, but this was only after twenty-five years of regular attacks on blacks, Hispanics, and other minorities. An ABC producer was asked whether Bob Grant's remarks were an example of free speech that should be protected under the First Amendment or whether they were verbal pollution. His reply was "If the person has good ratings a station has to overlook the garbage that he spews out." The same producer added, "[In the United States,] radio is the only serious soapbox the racists have. Our advertisers are aware that hate sells their products."[28]

The editorial responsibility that is so obviously lacking in this case is not surprising. If the product sells and makes a profit, that is all that is required. Ethical judgments, even where the only ethical requirement is a respect for evidence, is not part of its natural domain. Its *purpose* is to make money, not to sustain democracy, nor to expand common knowledge nor to extend the tastes and capacities of its audience.

Purposes matter. Almost all societies allow children to attend a single school for many years. The school is therefore the monopoly provider of both information and understanding—and at a particularly formative stage in a person's life. Yet an equivalent commercial monopoly, even later in life, is strongly resisted. The reason is that schools and commerce have different objectives. The *purpose* of a school is not to indoctrinate, but to educate. Indeed the exception proves the rule. In the rare number of cases when people do object to the influence of schools it is usually because the school is suspected of peddling a particular point of view to the detriment of education.

Closely related to this is what can be described as the "Yes, Minister" problem (after the famous U.K. TV show of that name). Someone has a piece of information. You may know that they have it and you may know that the information would be useful to you. However, you may not know what question to ask to elucidate that information. As the "Yes, Minister" program brought out so well, some civil servants like being in that kind of position, because information is power and power is not always given up easily. Typically the way in which this problem has been handled in the past has been through education. The *purpose* of educators is to empower other people and they want to teach people what questions to ask and how to use information to understand the world. Such an assumption cannot be made of the commercial world. The purpose of the commercial world is to make a profit. Nothing wrong in that, but it is different.

In brief, if democracy (and the role of its citizens) is left just to the market, democracy and its citizens will be poorly served. There will be a gap in broadcasting; a fully functioning democracy requires public service broadcasting to fill that gap. Moreover, one key principle for public service broadcasters to follow on this count is that they should aim to extend the understanding and experience of those who watch or listen. It is important to emphasize that this core principle is not restricted in its application to certain types of current affairs or documentary programming (although of course it does apply to them). Drama, soap operas, chat shows, children's programs, and situation comedies could all contribute to empowering as large a body of the citizenry as possible.

Public service broadcasters performing this function would therefore provide a central forum—the public space—within which society could engage in the process of extending its common knowledge as well as in illuminating and either reaffirming, questioning, or extending its already existing values.

RULES-BASED INTERVENTION VERSUS PUBLIC SERVICE BROADCASTING

The arguments above provide a strong case for thinking that broadcasting should not be left just to the market. There is therefore a *prima facie* case for intervention, but such arguments provide no guidance on the form that intervention should take. Why, one has to ask, could market failures not be dealt with by regulation, as occurs, for example, in the case of health and safety legislation?

The answer to this question is in two parts. First, it can be agreed that in some cases regulation is appropriate. For example, if the *only* concern of public policy were that child pornography should not be broadcast, then rules banning this activity could make an important contribution. The same is true of concentration. If the goal is to stop a single person or organization controlling a large part of the media, then laws limiting cross-ownership of media outlets have an important role to play. In short, the Federal Communications Commission (FCC) can play an important role—if it chooses to do so.

However, the second answer is far more important. In the particular case of broadcasting, rules-based intervention is necessary but not sufficient, especially not in the new environment of the late 1990s.

The first reason why rules are insufficient is that many of the issues concerning broadcasting are qualitative rather than quantitative in nature. This is self-evidently true of quality itself, but it applies equally to the discussion above of the importance of maintaining a sense of community as well as valuing a democratic society. These broad principles, which should guide part of broadcasting, could not be incorporated in any precise set of rules—indeed it is the impossibility of doing so that differentiates qualitative from quantitative assessments.[29]

The need to make qualitative judgments creates difficulties for all countries, but especially so in the United States where any attempt to *impose* such judgments on commercial companies is regarded as unconstitutional. Of course, it might, nevertheless, still be possible to design a legislative framework containing clear principles and for the *judgments* about the principles to be delegated to a broadcasting authority. However, once rules are discretionary, a new set of issues arises. The regulators, unable to appeal to a firm rule, may give in to pressure from those they are regulating. If so, the apparent attraction of rules-based intervention is much diminished. Similarly, if producers are required to act in necessarily loosely defined ways and in ways that are *against* their commercial interests, it may be more efficient to establish a public body charged with explicitly non-commercial goals than to police a complex and imprecise set of regulations. To put the same point another way, trying to achieve multiple and complex objectives via regulation is just writing a blank check for the lawyers.

The second reason why rules are insufficient is that rules are, at best, negative—especially when regulating *against* strong commercial forces. While regulation may, therefore, be able to protect standards, for example by *preventing* the display of excessive violence or sexual material considered offensive, it is much less well suited to *promoting* quality. This point is central. At numerous points in the earlier argument it has been shown that *purposes* matter. But purposes are about *doing* things—educating, informing, and entertaining, for example. Such purposes cannot possibly be achieved by rules because rules cannot make things happen. This is of great importance because, in the case of broadcasting it has been shown that there are gaps in the system which require *positive* pressure to correct them. This is why, corresponding to each area in which the market would fall down, it has been possible above to identify one or more primary *objectives* that a public service broadcaster should pursue. To offset market failure, it should aim to expand quality and to extend individuals' ideas of what they can achieve; to meet the requirements of citizenship it should provide for the needs of community (or communities); and to sustain democracy it should extend common knowledge and empower those that watch it or listen to it.

Moreover, none of these objectives is genre specific. Neither enrichment, nor our ideas of community, nor common knowledge are restricted to some "high-brow" ghetto. What will matter most of the time are not the *kinds* of programs that are made, but how they are made—hardly the task for a regulator.

Nevertheless, at the risk of repetition, it should be emphasized that the structure of broadcasting envisaged here would *include* some regulation. Indeed one fundamental point of this section is that, in the particular case of broadcasting, regulation and direct public provision can be and should be complementary to one another. Equally important is that the particular mix of regulation and public provision should change as the context changes.

In the late 1990s in the United States, as elsewhere, there are two reasons why this context is altering in ways that make rules-based intervention less effective. First, there is technological change. At the moment, the government (via the FCC) retains the ability to allocate frequencies and so regulation can be enforced. However, as satellite broadcasting (including from outside the borders of the United States) and Internet TV become more widespread, such regulation becomes more difficult. Second, the spread of the new media means that citizens will increasingly rely on television (or whatever the TV becomes) for their information. And, as shown above, good information cannot be produced via rules.

The answer to such problems is not to conclude that regulation is impossible, but to reconsider the objectives and to see whether there is some other way of influencing the market. One obvious possibility is to use public service broadcasting. If so, public service broadcasting will become more, rather than less, important as the technology develops.

One final point about the role of a public service broadcaster remains to be underlined. Each of the three grounds for public service broadcasting—the need to promote high-quality broadcasting, the need to generate a sense of community, and the need for citizens to have and understand the information essential for the functioning of democracy—exist independent of the particular set of choices made *now*.

Suppose, purely hypothetically, that everyone today had full information and full autonomy and that they chose a particular (narrow) mix of programs. This outcome would then have occurred without market failure. Nevertheless, given the potential interdependence between the broadcasting offered and the preferences of consumers, there would still remain the requirement that the *next* generation of consumers should be presented with a diverse, informative, and enriching range of programs so that *their* right to exercise *their* choice with full information and full autonomy would be ensured. The market, left to itself, would not guarantee this right. Consumers whose tastes were unexposed to, and underdeveloped by, a richer fare would not and could not demand programs that did not exist, and so producers, for their part, would experience no unfilled demand. There would be no driving force towards better quality.

Similarly, suppose—again hypothetically—that the interaction of today's consumers with the market produced a myriad of channels, each with its own format, each differentiated (however marginally) from the others, presenting an endless stream of diverse information and diverse lifestyles without apparent connection. Here again there would remain the case, many would say the imperative need, to present within one universally available channel the idea of a society (or societies) with which future generations of individuals could identify if they so wished. We cannot choose to belong to a society unless a society exists to which we may choose to belong. To deny future generations this would be to deny them a choice, not just between brand A and brand B, but about how they might wish to lead their lives and the kinds of people they might wish to become.

On all three grounds (quality, community, and democracy), therefore, a major argument for public service broadcasting today is that it provides an insurance policy for the desires, needs, and rights of the generations of tomorrow. Moreover, this is not an insurance policy that any form of rules-based intervention will provide. What is required, especially within the increasingly deregulated environment of the late 1990s, is one or more public service broadcasters, widening and extending choice, both by its own existence and by its influence on other broadcasters.

There is much misunderstanding on this question of choice. It is clear that the fear of censorship and, in particular, of hidden censorship, has loomed large in the minds of many of the critics of public service broadcasting. In the United States in particular such fears are written deep into the Constitution—no discussion of U.S. broadcasting is complete without reference to the First Amendment. Similarly, in the United Kingdom, such fears are a major reason for criticism of the BBC, which is seen by some as elitist and paternalistic. These fears and criticisms were understandable in the past when spectrum scarcity prevailed and when, as a result, access to televisual media was, as the critics would have said, exclusively under the control of either state-funded or state-authorized institutions. But this will not be the broadcasting world of the next century. Satellite, cable, and video mean that private televisual media will expand considerably irrespective of the role played by public broadcasters and so, in this new world, provided only that the costs are met and the general law of the land is respected, no one will be *denied* making or seeing anything they wish. On the contrary, in the face of the new technology which threatens excessive fragmentation, the loss of common knowledge, and low quality, it will be the existence of a public service broadcaster that *widens choice* and which, through its commitment to provide understanding, gives the *means to make the choice for oneself.* Thus a vibrant commercial system *plus* a context influenced by public service broadcasting would be the very opposite of elitism, paternalism, or censorship.

In other words, public production and public broadcasting is needed for the health of the *whole* system. Thus public service broadcasting is central, not an optional add-on. In short, such a public service broadcaster is a real public good and the true justification for public funding is not the financing of a particular corporation, but the financing of choice, quality, and public information throughout the system as whole.

Just as in the nineteenth century no one thought that regulation could *provide* public libraries, so in the twenty-first century regulation cannot provide public service broadcasting. Public service broadcasting exists to meet goals that are not those of the market and no amount of regulation can make the market pursue such goals. Thus while public service broadcasters have no *right* to exist, there are *purposes for their existence*.

POLICY SUGGESTIONS

The arguments above have set out the case for public service broadcasting. If this is to exist, what form (or forms) should it take? No attempt will be made here to answer this question in detail. Nevertheless, the arguments above plus the particular context of the United States suggest certain key principles.

First, and most important of all, there has to be a public service broadcasting *institution*. Trying to impose public service obligations on the commercial channels is hopeless in the U.S. context. As noted in the Bertelsmann study mentioned above, socially responsible television occurs only when it is a constant strategic aim of the management of the broadcaster. Moreover, as Henry Geller argues, the "play or pay" option always was a non-starter—any commercial broadcaster will always spend as little as possible on the public service slots that have been imposed upon it.[40] Even in the U.K. context such public service obligations only worked (a) because U.K. regulators can make qualitative judgments (not possible in the United States), (b) because the BBC is very large and so able to influence the system as a whole (not applicable to the United States), and (c) because the U.K. system has in the past contained an element of monopoly profit so there was scope for the commercial broadcasters to act "non-commercially" (but even this is rapidly disappearing). In short, instead of legal regulations or obligations there must be direct public provision.

Second, as emphasized earlier, legal regulations can play a complementary role. In particular, depending on the structure chosen, regulations on both the national commercial channels and on cable TV could insist on a "must carry" clause as well as on a "must display prominently" clause so that in the world of digital television the viewer can easily find the public service broadcasts on his/her EPG. In saying this it must, of course, be noted that a "must carry" clause is fundamentally different from a system in which commercial broadcasters are required to reserve a certain number of hours for public service broadcasting, *but hours which they then fill*. What is implied here is that they would be required to broadcast material *produced by the public service broadcaster(s), which, with adequate funding, should be of high quality*.

Third, the institution must be publicly financed. The analogy with club membership was made above—and for the nation the club is everyone and with no opting out. What is more, the fixed costs must be met collectively, but with consumption of the services free at the point of use (for all the reasons given above).

Fourth, the scale of such a broadcaster must be substantial and it must not spread its investments too thinly. In particular, if such a broadcaster were to transmit its own programs nationally it should not at the same time aim at providing a proliferation of channels. Both of these points follow from the requirement that there must be sufficient funds to meet the high fixed costs that quality requires—and if it is not to be high quality, why bother?

Fifth, if one of its key roles is to provide the core public information to which all citizens are entitled, and without which there will be a nation of the information-rich and the information-poor, then it must be universal in its reach. It must therefore be nationally available (another reason why it must be substantial in scale and why "must carry" clauses could be so important).

Sixth, it must make some of its own programs (though not necessarily all). This is because so many of the public service objectives are *not genre specific*. Neither enrichment, nor our ideas of community, nor common knowledge are restricted to some "highbrow" ghetto. What will matter most of the time are not the *kinds* of programs that are made, but how they are made. There must therefore be an institution whose *purpose* is the making of public service programs. The argument is exactly analogous with the reasons why we have schools and universities. They have purposes quite different from those of the market and these values and purposes—just like any others—require an institutional context if they, and the individuals committed to them, are to prosper.

One final suggestion remains to be made. It has been argued above (and by many others before) that television is uniquely well placed to provide the new public space within which the issues of the day can be debated. Digital television dramatically rein-forces these possibilities both by creating the potential for interactivity and by increasing the availability of the spectrum. What is more, here there is genuine scope for (a) television to be local, and (b) for low-cost entry. Web-based TV does offer wholly new possibilities for deliberative discourse. Nevertheless here also there is scope for an extremely important public service element. The evidence is overwhelming in favor of the view that constructive debate occurs best when someone acts as a moderator so that some degree of order is maintained and so that someone sometimes, gently and tactfully, summarizes and/or poses the next question. Carrying out this task of editing, facilitating, and moderating in ways intended to be democratic is self-evidently a public interest activity.

In other words, entirely complementary to the public service broadcasting institution recommended above would be the training of individuals to act as the new public interest moderators. At the risk of repetition it must be emphasized that there is no implicit censorship here—multiple commercial sites where anything that the market will support and tolerate would, and should, still exist. But alongside this, it is recommended that there should be some sites, run locally, but possibly supported centrally by funds and training from the public service broadcaster (as well as by other quasi-public or not-for-profit organizations), whose function would be the promotion of local democracy and local participation.

SUMMARY AND CONCLUSIONS

Who needs public service broadcasting in a digital era? The answer is that we all do and that the new technology *increases*, not *decreases*, this need. The reasons are, first, that there is a real danger that if broadcasting were left just to the market it would become excessively concentrated; second, that even if this were not the case, commercial broadcasting on its own would fail to produce the form of broadcasting which people individually or as citizens and voters collectively require; and, third, that there is no set of rules or regulations or laws which could entirely correct the deficiencies of a purely commercial system. This is for the simple but powerful reason that rules are necessarily negative. They have the capacity only to stop the undesirable. They cannot promote the desirable.

The only way to counteract fully the deficiencies of a purely commercial system is through the existence of a broadcaster that has as its driving force the ethos of public service broadcasting. In the context of the United States such a public service broadcaster willwould fulfill four crucial and interrelated roles.

First, it would act as a counterweight to possible monopolization of ownership and yet fragmentation of audiences in the private sector. Second, because its purposes are different, it wouldill widen the choices that consumers individually and collectively wouldill face. Third, provided that, via one means or another, it wereis universal in its reach, it would beis the only sure way of protecting against the emergence of the information-rich and the information-poor. Fourth, and most important of all, it is essential that in a democratic society the issues of the day should be debated not just in terms of the values of the market, but also in terms of the public interest.

There could be more than one such public service broadcaster—since competition *within* the public sector is also healthy. But this would only be sensible if funding on a very large scale were available. Moreover, if it were, then it would be essential that one of them be vertically integrated. This follows from two considerations. First, there is the need for public service broadcasting to be concerned with the full range of broadcasting (training, production, scheduling, and broadcasting). Second, public services values and the commitment to quality can only be maintained, developed, and passed on within an institutional framework that persists.

Equally important is that, alongside any public service broadcaster, there should be an active commercial sector. Each improves the other. The commercial sector keeps the public sector competitive; the public sector raises quality and keeps the commercial sector honest.

In brief, such public service broadcasting is not an optional add-on. It is central to the health of all broadcasting and, beyond this, to the health of a democratic society.

Endnotes

U.S. President Bill Clinton's establishment on 11 March 11, 1997 (Executive Order No. 13038) of an Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters is part of a wider reassessment taking place in many countries of the impact of the digital revolution on broadcasting. This paper draws on academic research in the United Kingdom and the European Union, but is written to address the specific concerns of the United States. I am grateful to Monroe Price for very helpful comments on this paper and to John Libbey Media for allowing me to draw on my earlier publication (together with Gavyn Davies), *Broadcasting, Society, and Policy in the Multimedia Age*. The usual disclaimers apply.

1. Peacock Committee, *Report of the Committee on Financing the BBC*, Cmnd. 9824 (London: HMSO, 1986), paragraph 477.

2. In economics, "common knowledge" is a technical term in the theory of games that means "what is known by all and is true." I use it here to cover a broader category of cases.

3. According to Andrew Neill, speaking on Radio 4, 1 December 1996.

4. *Voice of the Listener and Viewer: The Citizen's Voice in Broadcasting*, 1996 (101 King's Drive, Gravesend, Kent DA12 5BQ, England).

5. *Financial Times*, 17 January 1998.

6. Proctor and Gamble had an earlier small interest in sponsoring broadcasting—hence the term "soap operas."

7. Technology now being tested for the Internet called Program Interface Content Selector (PICS) allows consumers to check, via ratings offered by third parties, whether or not to receive particular material.

8. The initial researchers were working on projects for the U.S. Department of Defense, which also provided the early funding, but the bulk of the research was done in universities or by people seconded from universities.

9. Twentieth Century Fund, *Quality Time? The Report of the Twentieth Century Fund Task Force on Public Television* (New York, N.Y.: Twentieth Century Fund Press, 1993).

10. The seminal article was K. Arrow, "Economic Welfare and the Allocation of Resources for Invention," in *The Rate and Direction of Inventive Activity: Economic and Social Factors, Universities*, National Bureau Committee for Economic Research (Princeton, N.J.: Princeton University Press, 1962).

11. It should be noted that the usual economic argument for charging for something (whether this is a "price" or a "subscription") does not apply to broadcasting because there is no question of anything being scarce. Broadcasts are a public good because one person's consumption does not compete with another person's consumption. It would therefore be perverse to insist that broadcasts become "narrow-casts."

12. J. Mepham, "The Ethics of Quality in Television," in *The Question of Quality*, ed. by G. Mulgan (London: British Film Institute, 1989), 67, emphasis added.

13. See M. Katz and J. Ordover, "R&D Cooperation and Competition," in *Brookings Papers on Microeconomics* (Washington, D.C.: The Brookings Institution, 1990).

14. J. Forbes, "France: Modernization Across the Spectrum," in *The European Experience*, ed. G. Nowell-Smith (London: British Film Institute, 1989), 29.

15. Forbes, "France: Modernization Across the Spectrum," 33.

16. *Financial Times*, (London, 27 December 1991).

17. E. M. Noam, et al. "The United States of America," in *Television Requires Responsibility* (Gutersloh: Bertelsmann Foundation Publishers, 1995), 391-461.

18. Noam, "The United States of America," 408 and 409.

19. B.P. Lange and R. Woldt, "The Results and Main Conclusions of the International Comparisons," in *Television Requires Responsibility* (Gutersloh: Bertelsmann Foundation Publishers, 1995), 484.

20. T. Madge, *Beyond the BBC: Broadcasters and the Public in the 1980s* (London: Macmillan, 1989), 59.

21. Madge, *Beyond the BBC*, 209.

22. R. Williams, *Normal Service Won't Be Resumed: The Future of Public Broadcasting* (St Leonards, New South Wales, Australia: Allen & Unwin, 1996), 15.

23. B.P. Lange and R. Woldt, "The Results and Main Conclusions of the International Comparisons," in *Television Requires Responsibility* (Gutersloh: Bertelsmann Foundation Publishers, 1995), 463-502.

24. I. Hamm and F. Harmgarth, "Responsibility of Television–An Introduction," in *Television Requires Responsibility* (Gutersloh: Bertelsmann Foundation Publishers, 1995), 5-7.

25. President Bill Clinton at the National Press Club, 11 March 1997.

26. C. Gallucci, "How Many Votes Did TV Change?" *L'Espresso*, 11 November 1994.

27. "One Voice on Italy TV," *Free Press-Journal of the Campaign of Press and Broadcasting Freedom*, (London: July/August 1995).

28. Quoted in R. Williams, *Normal Service Won't Be Resumed*, 92.

29. Some of the problems of regulating public utilities where there is an element of quality are discussed in L. Rovizzi and D. Thompson, *Price-Cap Regulated Public Utilities and Quality Regulation in the U.K.* (London: Centre for Business Strategy, Working Paper Series No 111, London Business School, 1991). However, the authors frequently mean not "quality," but "standards" and therefore treat quality as quantifiable, a confusion that the English language has been designed to avoid!

30. Henry Geller, "Public Interest Regulation in the Digital TV Era," in R. G. Noll and M. E. Price, *A Communications Cornucopia: Markle Foundation Essays on Information Policy* (Washington, D.C.: The Brookings Institution, 1998).

A Structure and Efficiency Approach to Reforming Access and Content Policy

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INTRODUCTION

From its inception, broadcast television has been recognized as having the potential to serve a variety of important social and political needs in addition to broadcasters' commercial interests and the interests of viewers as consumers. Because broadcasting in the United States has always been dominated by privately owned broadcast operations, the question of how a television industry so constituted might be induced to serve societal goals in addition to broadcasters' commercial objectives has been an issue of perennial debate—a debate given some urgency by the impending transition to digital television and the need to make sure that policies appropriate to a digital television industry are in place before the transition occurs. An important part of this ongoing debate addresses issues relating to the content of television programs and the commercials within those programs, including the roles of policies governing access to program time or commercial time in determining content.

Previous work by participants in the Aspen Institute Working Group on Digital Broadcasting and the Public Interest identified four benchmark models for reforming content and access policies.[1] This chapter offers a critical assessment of those benchmark models and proposes a fifth model for the reform of access and content policy. At its broadest, an exercise of this type can address three very general questions:

- Is there good cause to change the current regime governing public interest programming by broadcasters?
- Does the transition to digital broadcasting fundamentally change the issues of concern and the need to address them through regulatory intervention?
- Assuming that reform is called for, how is it best accomplished?

Our analysis focuses primarily on this third question. While we recognize that disagreement exists over the need to change the current regulatory structure, the analysis presented in this chapter accepts as a working hypothesis that such a change is warranted.

The nature of the concerns addressed through public interest programming[2] is such that there is no quantitative measure or index to tell us whether the many and various public interests served through television are being adequately addressed. Such assessments are by necessity subjective and politically expressed. The fact that dissatisfaction with the current state of affairs is fairly widespread might itself be taken as evidence of needs inadequately served, although this suggestion begs the question of whether there are superior alternatives. If, however, a broad consensus exists that the current system can be substantially improved, the transition to digital broadcasting is the ideal opportunity to make the attempt, regardless of whether or not there is anything unique to digital broadcasting has unique qualities that should be reflected in public interest requirements for broadcasters. This period of transition will be sufficiently disruptive that much of the old bargain with broadcasters must of necessity be rewritten; government and industry are already embedded in this process. Any larger scheme for regulating broadcasters will have more integrity if all the pieces are put in place simultaneously, rather than assembled piecemeal.

In assessing proposals for reforming content and access policies, we employ two criteria. First, is a proposed policy structurally appropriate? By this we mean to what extent does a policy proposal actually address the ultimate sources of the various content and access policy concerns? Second, if a policy proposal is structurally appropriate, is it the most efficient, or even the most effective, way of addressing a specific policy concern? That is, are there other policies that might either address the same concern more fully or at a lower opportunity cost?[4]

To address the root causes of content and access policy concerns, we must first identify them. While many different specific complaints about content and access have been voiced regarding television broadcasting, the first section of this chapter argues that all of them reflect a small set of behavioral traits of three sets of actors: viewers, commercial broadcasters, and people directly involved in the political process. Content and access policies are structurally appropriate only to the extent that they acknowledge and respond to these basic behavioral traits. The second section evaluates the four benchmark models in terms of their structural appropriateness, and the third section evaluates them again in terms of their effectiveness and the efficiency with which they address the policy concerns for which they are appropriate. The fourth section builds on the analysis of the previous three sections to develop a fifth model for access and content policy reform, one that we believe can harness the self-interest of the relevant actors to address the shortcomings we see in the benchmark models. The chapter concludes with a summary of our analysis and reviews its implications for content and access policy.

THE BEHAVIORAL ROOTS OF CONTENT AND ACCESS POLICY PROBLEMS

At the heart of the complaints about the current system and the fears regarding what will happen with digital television is the concern that, in the absence of policy intervention, most television viewers will consume too little of certain types of information believed to be beneficial to themselves or others, and/or will consume too much programming of types believed to lead to harmful effects (particularly for children). If this concern is legitimate, it must be because, left to their own devices, some or all of the relevant private actors—viewers, commercial programming services, and participants in the political process—will fail to fully internalize the public interest in their private decisions. Four sets of underlying factors might contribute to this problem of over- or under-consumption of certain types of programming.

Misalignment of Personal Consumption Incentives and Viewers' Private Interests or the Public's Interest

It is important to realize that there is both a supply side and a demand side to the television consumption problems identified with the current system. While policy proposals have tended to focus on supply (require more of favored types of programs, limit the quantities of disapproved program types, etc.), the efficacy of such solutions is constrained by the extent to which they have their roots in underlying viewer preferences.

Demand-driven under and over-consumption problems may arise in two ways. One is that viewers may not realize their own true self-interest in the viewing choices they make. The second is consumption externalities. Society at large realizes benefits or is harmed by certain viewing choices made by individual viewers, but viewers attending to their own self-interest pay no attention to the societal consequences of the choices they make.[7] Why might viewers fail to realize maximum personal benefits from the programs they select? One justification for such a claim could be that, individually, viewers suffer from a failure of will when they make choices among alternative programs. While people may recognize that in the long run they would be happier, or more content, if they watched more educational, or political, or cultural programming, the here-and-now temptation of more titillating, but ultimately less-satisfying programs, is too much to resist. It's like the dieter at a buffet who can't resist one last trip to the dessert table, knowing all the while that he or she will regret the added calories later on. While such an argument is analytically plausible, absent solid empirical evidence that most viewers wish that they were forced to make different viewing choices on a regular basis (and, with the possible exception of children's television, we are aware of no such evidence), we find this notion to be dubious as a justification for some sort of collective enforcement of will regarding the types of programs watched. It is too easy for cultural elitism to masquerade as well-meaning assistance for people considered too weak-willed to do what is in their own best interest.

A second justification for intervening in viewing choices to force individual viewers to watch more of the types of programs that will improve their individual lots is that viewers themselves do not (or are not able to) recognize their own long-term interests in their choices of programs, while public officials do (or are able to). The dangers of elitism cloaked in expressions of concern for the common good (or the good of the common person) are obvious in this kind of argument as well, but it is also consistent with the logic of representative democracy. The issues associated with children's programming again provide a case in point. It is too much to expect individual citizens to carefully review the voluminous academic literature on the effects of violent programming on children's attitudes toward violence. Yet, it is not unreasonable to expect congressional subcommittees or regulatory agencies to undertake such investigations—as they have done. Nevertheless, whether it is lack of information or failure of will that is alleged, the obvious danger that one group may use the policy process to increase the supply of programs that it favors at the expense of those favored by others dictates that proposals to regulate programming on behalf of viewers' individual self interests should have to meet extremely high evidentiary burdens before being implemented.

The externalities argument for trying to change viewing choices is easier to accept as grounds for policy intervention because it is congruent with our basic notions of how a democratic society should function. It is generally accepted that a more-informed citizenry makes better policy choices, and that all citizens benefit when this is happens. Each citizen therefore has a vested interest in the amount of policy/politically relevant information consumed by every other citizen. If television programming does, or can, make a meaningful supplemental contribution to the informational base from which citizens form opinions and influence policymaking, there may be substantial public benefits from policies that successfully modify viewing choices. Whether such policies can be justified depends on their practical consequences, however, an issue discussed more fully below.

Misalignment of Commercial Motives and the Public Interest in Program Content

Commercial and public interests in program content may be misaligned for at least two reasons. The first follows from a failure of viewers to internalize their own and society's long-term interests in their viewing decisions. Commercial broadcasters profit by satisfying the wants and needs that viewers do express. If viewers don't recognize their own personal (long-term) interests in the programming choices they make, or if they fail to internalize the larger public interest in what they watch, then commercial broadcasters will do nothing to address these consumption problems. In fact, they will profit most by catering to these basic failings of viewers as consumers. This is true for broadcasters supported by both advertisers and viewer payments.

A second reason why commercial program offerings may not be well aligned with the larger public interest in programming is the widely recognized tendency of an advertiser-supported broadcast system to oversupply the types of programs preferred by viewers with majority preferences and undersupply the types of programs desired by viewers with less mainstream tastes. This problem, which has been extensively studied by economists, also arises, although not as severely, with pay television.[5] The basic problem is that broadcasters have an incentive to continue to offer increasing numbers of highly similar programs targeted to a large audience of majority taste viewers—even though the contribution of an additional marginal mainstream program to viewer welfare may be quite small compared to that of a program appealing to a smaller audience whose preferences aren't well served by mainstream fare. Only when further subdivision of the mainstream audience becomes less profitable than more specialized programming for viewers with less mainstream tastes will the incentive structure change.

Misalignment of Market Allocations of Commercial Time and the Public Interest

There are at least four reasons why commercial and public interests in the allocation of commercial time might not be in alignment. The first relates to the allocation of ad time between commercial and political messages. The basic problem is that candidates and voter initiatives compete in a political arena, but do so in part by purchasing advertising time sold in a commercial arena. There is no reason to expect that the amounts that commercial advertisers are willing to pay and the amounts that political actors are willing to pay for ad time will be an accurate gauge of the relative contributions of commercial and political speech to the public good. In fact, it is widely believed that the demand for ad time expressible by political actors is not commensurate with the social benefits of their messages—so commercial speech unduly crowds out political speech.

Second, because market allocations reflect willingness to pay, which for political speech means ability to pay, the allocation of commercial time among political messages may not reflect the public's true interest in the relative amounts of exposure given to different messages. A commonly expressed concern is that the allocation of political ad time among candidates and initiatives on the basis of market prices unfairly biases political debate in favor of incumbents (who typically are able to raise more campaign money than their challengers) and status quo solutions generally over less traditional alternatives (because large commercial interests with much at stake in the status quo are willing to contribute heavily to maintain it). The fear is that well-financed interests will simply drown out their opponents' messages by flooding the air waves with their own commercials.

Third, there is also the concern that commercial broadcasters may refuse to sell time to candidates advocating policies they don't like, or offer time at discriminatorily low rates to candidates with views of which they approve. This too is a market allocation problem, if broadcasters' interests in political outcomes are allowed to influence business decisions regarding the sale of ad time.

Finally, it might be argued that viewers watch the public interest programming that is available less frequently than they should because they are not adequately informed about its existence, content, and scheduling. This information deficiency might be rectified by advertising public interest programs on the more heavily viewed commercial programs; but there is no reason to expect that market allocations of ad time will adequately reflect the public benefits in ads for public interest programming. Note, however, that this argument is not independent of the claim that viewers' choices of what to watch do not reflect the full value of public interest programming to themselves and to society. If they did, broadcasters would find it profitable to produce and to promote such programs just as they do more traditional entertainment programs.

Misalignment of Messages Supplied by Political Actors and Voters' Information Needs

Independent of the concern that commercial markets for advertising time and program time will not allocate enough time to political messages, there is also the concern that, if left solely to political actors, political messages will not provide as much useful information as they should. In this case, it is the personal interests of political actors that are not entirely consistent with the public's interest in the messages they supply. The primary objective of politicians and supporters of ballot initiatives is to convince voters that they themselves represent the right choice, not to provide voters with the information required to make the right choice. Thus, the messages supplied by political actors are likely to be characterized by omissions and mischaracterizations (both of themselves and of their opponents) that make it more difficult for voters to make informed choices. Given the misalignment of commercial and public interests discussed above, these deficiencies in political debate are not likely to be corrected by commercial broadcast programming. The solution, therefore, requires some sort of policy intervention, perhaps in relation to campaign reform more generally.

STRUCTURAL ANALYSIS OF THE FOUR BENCHMARK MODELS

Content and access policies can succeed only to the extent that they directly confront the factors giving rise to content and access problems discussed above. Different responses are appropriate to each of the four sets of factors.

The problem of personal consumption incentives not fully reflecting the public's interest in viewers' choices can be addressed by either trying to change viewers' tastes in programs to bring them more in line with the public's interest in their viewing choices, or by changing the set of programs they have to choose among. While the viewing options available are likely to have some impact on the evolution of viewer tastes, substantial change in viewer preferences is an ambition that can be achieved only in the long run (if ever), perhaps through the educational system. It is also a goal that most likely cannot be accomplished with policies whose direct impacts are on the content of a limited number of programs and on conditions for access.

Viewers' options may be beneficially altered in two ways: public interest programs can be made more appealing to viewers, and commercial alternatives to public interest programs can be restricted. Making public interest programs more appealing requires that more money be spent producing them, and, perhaps, that more of them be broadcast so that viewers are more likely to find them available when they have the time and inclination to watch television. Restricting commercial alternatives would certainly be the most effective way of increasing the viewing of public interest programming—if the options were restricted at the same time that programs of particular public interest were being broadcast. For example, all networks, both broadcast and cable, might be required to carry presidential debates. Restricting commercial options generally is not a politically feasible option when the current, and increasing, abundance of channels is apparently so important to so many viewers (and voters).

Solutions to the other three sets of factors are more obvious. The appropriate response to the problem of commercial motives not fully reflecting the public interest in program content is to either finance or compel the production of programming different from that generated by the market. The response to the problem of markets for ad time underallocating time to ads for candidates, political issues, and public interest programming is similarly direct. Either purchase or compel broadcasters to provide the ad time required to remedy the imbalance. Finally, if televised information supplied by political actors is not sufficiently informative, the solution is to produce programs (or commercials) that provide the information voters need to make informed decisions.

How do the four benchmark models stack up when judged by these criteria for structural effectiveness? None explicitly addresses the problem of politician-supplied information being insufficient and in some cases misleading. But it may be unrealistic to expect a policy solution to this problem, because it would have to be approved by the politicians whose claims and promises would be scrutinized. Other than this, there is considerable structural variation in the four models.

The Improved Public Trustee Model

This is the least radical of the four benchmark proposals. Since the inception of broadcasting in the United States, both radio and television broadcasters have been granted commercial licenses contingent on providing certain services deemed to be in the public interest. While the interpretation of broadcasters' public service obligations has varied over time, the existence of such obligations as key features of their licenses has not been questioned.[8] Under the benchmark proposal for reforming the public trustee model, the following current public interest obligations on broadcasters would be maintained and extended to cover digital broadcasting: provision of civic programming and educational programming in the public interest as specified in license regulations and supplemental rules (e.g. the Children's Television Act); provision of equal opportunities for access for electoral candidates (equal time) at LUR (lowest unit rates) and reasonable access for federal candidates; and minimum behavioral requirements (sponsor identification, no payola, etc.).

In response to complaints about the current system, new requirements would be added and certain existing ones strengthened. Proposed revisions include elimination of "postcard renewal" of licenses (to force a more thorough performance review) and reinstatement of the Fairness Doctrine's requirements for broadcasting material in the interests of civic participation in politics and increased diversity of viewpoints. Other revisions would lessen the regulatory burden on broadcasters, such as broadening exemptions to equal-time requirements to encourage stations to broadcast more political programming and eliminating LUR requirements in exchange for free time for political candidates. Other changes have also been proposed to streamline and simplify public interest obligations, such as the development of quantitative and qualitative guidelines for educational and civic programming. Finally, while it is often not considered in discussions of the public trustee approach, it must be recognized that broadcasters' public trustee obligations are to be carried out in a television industry that also includes the Public Broadcasting System (PBS), whose mission is also to supply programming that remedies deficiencies of the private system.

If we judge this model only on structural appropriateness, and set aside the question of how effective it is in achieving content and access policy goals, the public trustee approach doesn't look too bad. Programming that would not naturally be supplied by commercial broadcasters is provided by the stations of the Public Broadcasting System, and by commercial broadcast stations through the enforcement of the requirements of the Children's Television Act and other requirements for the broadcast of educational and civic programming. Requirements that broadcasters air public service announcements and sell ad time to political candidates at LUR address the problem of commercial messages squeezing out political messages whose value to the public is not fully reflected in the amounts candidates and issues advocates spend on advertising. The public trustee model does not directly address the problem of viewers' choices not appropriately reflecting the larger public interest in what they watch (or even their own long-term personal interests), but, except to the extent that they can fund more attractive PBS programming, neither do any of the other benchmark proposals. This version of the public trustee model also does nothing to raise viewers' awareness of the program offerings on public television channels; but adding a requirement that commercial broadcasters set aside some ad time for the promotion of public station programming would seem to be a relatively minor amendment to current proposals for an enhanced public trustee obligations.

Perhaps it should not be too surprising that the various elements of the revised public trustee/PBS approach for dealing with content and access policy issues are relatively well targeted from a structural perspective. They evolved through a process of trial and error selection over decades as policymakers responded in a rather ad hoc fashion to very specific policy problems. The real problems of the public trustee approach are problems of efficiency and effectiveness, which we discuss in the next section. While some problems may arise from underfunding, others are simply the consequences of poor instrument design.

The Spectrum Fee Model

Under this model, broadcasters would be relieved of all public interest programming requirements and would thus lose their "public trustee" status, although certain minimum behavioral requirements relating to open or fair business practices[9] and restrictions on indecent and obscene content would be retained.[10] In exchange for this relief, and in order to provide what commercial broadcasting has so far been unable to do to general satisfaction, a fee (the suggested range is 1-3 percent) would be levied on some combination of broadcasters' gross advertising revenues and receipts from station sales. The fees collected would fund an enhanced public broadcasting system and possibly a political "time bank" enabling candidates to purchase time on broadcast stations. An enhanced PBS system would take primary responsibility for providing political, educational, and civic programming in the public interest, although commercial broadcasters might still be required to publicize such program offerings on their own channels.

Like the revised public trustee model, the spectrum fee model (also referred to by Henry Geller as the "pay/public broadcasting model"[11]) addresses the problem of certain types of programs being undersupplied by commercial broadcasters by providing such programs on public television stations. Only with the political time bank does the spectrum fee approach address the problem of too little ad time being allocated to political speech; the problem of meeting the public's interests by public service announcements is not addressed at all, although this too could be funded through a more broadly defined time bank. To the extent that fees collected from broadcasters permit higher budgets for PBS programs, the problem of viewer choices not reflecting public interests could be at least partially addressed, although this gain would be offset to some degree by the loss of public interest programming that would otherwise have been provided by commercial broadcasters under the public trustee approach. While the spectrum fee benchmark model makes no explicit provision for advertising PBS programs on commercial channels, a portion of the fee-generated funds could be used to purchase commercial time for this purpose.

Pay Plus Access

Pay-plus-access is a hybrid of the spectrum fee and public trustee approaches. Broadcasters would be relieved of most public interest programming requirements except for minimum free-time requirements for electoral candidates. Candidates would be allotted broadcast time during an election campaign, some of which would be in prime time. Because of the candidate free-time requirement, broadcasters would remain limited public trustees. However, in order to cover the rest of their public service obligation, a fee would be levied in the same manner as in the spectrum fee model. Funds collected could be used to subsidize the purchase of advertising by electoral candidates (either through funds controlled by political parties or through a time bank against which candidates could draw) and to finance high-quality civic and educational programming by public broadcasters. Access for other types of political or even civic and educational programming might also be required via a leased-access scheme similar to the leased-access channel requirements for cable television, but equal time provisions would be eliminated. Broadcasters might also be required to publicize the expanded programming options available via public broadcasting.

Like the spectrum fee approach, pay-plus-access addresses the problem of viewers choosing to watch too little public interest programming by raising funds through a fee on broadcasters that could be used to finance more appealing public interest programs. By funding the production of PBS programs, the model also addresses the problem of the commercial system supplying too little of certain types of programs. The same objectives would also be served by leased-access requirements if they were included as part of this approach. The problem of access to ad time for political speech is addressed through the minimum free-time requirements for political candidates and the use of fees collected from broadcasters to subsidize political advertising. Deficiencies of the commercial system in informing viewers of the availability of public service programs would also be addressed if commercial broadcasters were required to publicize them, although it should be noted that this extends broadcasters' obligations beyond simple access.

Pay or Play

Under the pay-or-play model, broadcasters would be given the option of meeting clearly specified public interest programming obligations or paying to get out of these requirements. Two variations on this approach differ according to who would get paid by a broadcaster buying out obligations.

What has been called the "spectrum check-off" variant would assign each broadcaster an explicit financial obligation in exchange for the continued right to use its portion of the broadcast spectrum. The market value of the spectrum employed for broadcasting has been suggested as one way of determining the financial magnitude of the obligation. (We will comment on the merits of this approach to quantifying the obligation in section III. We simply note here that neither the magnitude of the financial obligation nor the manner in which its value is determined plays a role in the operational logic of the spectrum check-off proposal.) Because we have reservations about the use of the current commercial value of broadcast spectrum to financially quantify a broadcaster's obligation, and because the use of the check-off mechanism is not dependent on any particular methodology for quantifying the obligation, we will use the more general term, "obligation check-off," in referring to this approach.

With obligation check-off, broadcasters could choose among the options of: (1) covering their obligations with outright cash payments—which would then be used to support public interest programming by public broadcasters; (2) earning "check-offs" against their obligations by providing public interest programming and access time on their own stations (access time commitments could include free ad time for candidates and public service announcements); or (3) combining cash payments and check-offs.

What we will call the "tradable obligations" variant of pay-or-play would assign each broadcaster a set of obligations that would be clearly specified and quantified in terms of programming and access to be provided. Broadcasters would be allowed to trade these obligations amongst themselves, with the terms of trade set by law or by regulators. The tradable obligations proposal was inspired by the trading in pollutant emission rights made possible by the Clean Air Act of 1990. Market efficiencies are the intuitive appeal of this approach. Ideally, trading in public service obligations (which could involve cash payments among stations) would result in these obligations being met by the stations able to do so most efficiently.

To the extent that the public interest obligations specified under either version of pay-or-play result in more resources being devoted to public interest programming and more time set aside for public interest purposes than is currently the case, both address the problems of commercial broadcasters undersupplying certain types of programming and spending too little to produce it relative to what is appropriate for public policy purposes. Because the quantifiable public interest obligations of the tradable obligations approach could cover virtually any public interest that might be served by broadcasters, almost any content or access policy goal could theoretically be addressed, with one notable exception. If the sponsors of political messages require access to the vast majority of prospective voters, allowing the trading of obligations to provide access to ad time could result in the concentration of political advertising on a few stations that reach only a fraction of the total television audience. The obligations checkoff model thus has the potential to fail completely in this regard, should broadcasters decide to buy their way out of these obligations entirely.

Table 1 summarizes this review of the four benchmark models in terms of their structural appropriateness. By structural criteria alone, there is no obvious winner or loser among them. Each has advantages and disadvantages relative to the others. It is also worth noting that the structural elements of these proposals could be combined in various ways. Thus collectively they might be viewed as a menu of options from which policymakers could pick and choose in developing content and access policies. However, any final judgment regarding the merits of these four benchmark proposals and any combination of their components must also reflect effectiveness and efficiency considerations.

EFFECTIVENESS AND EFFICIENCY ASSESSMENTS

Complaints about the way the public trustee approach to content and access policy is currently handled are of three general types: (1) Commercial broadcasters get off too easy because they are not required to make public interest contributions commen-

Table 1: A Structural Assessment of the Four Benchmark Models

Does the Model Solve the Stated Problem?	**A. Personal consumption incentives do not match personal or public interest.**	**B. Commercial program supply incentives don't match public interest.**	**C. Market allocations of advertising time do not serve public interest.**	**D. Supply of political messages does not provide voters with appropriate or sufficient information.**
Revised public trustee model	No.	Yes. It broadens equal-time exemptions, reinstates the Fairness Doctrine.	Yes. It mandates reasonable access at LUR.	No.
Spectrum fee model	Not necessarily, but could do so partially if extra money were used to fund more attractive public service programming.	Yes. It provides public interest programming via a better-financed PBS.	Yes. It provides increased public funding for ads for political candidates and initiatives.	No.
Pay + access model	Not necessarily, but could do so partially if extra money were used to fund more attractive public service programming.	Yes. It provides public interest programming via a better-financed PBS and requires free candidate time and perhaps free access programming time.	Yes. It requires free ad time for political candidates; and may provide access for other public interest programming via leased-access.	No.
Pay-or-play model	Not necessarily, but could do so partially if extra money were used to fund more attractive public service programming.	Yes. It provides public interest programming via a better-financed PBS or broadcasters.	Yes, if broadcasters opt to supply access time themselves. Not clear if public broadcasters choose to pay instead.	No.

surate with the value of the spectrum they use for free; (2) the public doesn't receive the benefits it should from commercial broadcasters' performance of the obligations they do have; and (3) the public broadcasting system that is supposed to compensate for the failings of commercial broadcasters is underfunded. At heart, the first and third complaints are assertions that, respectively, broadcasters should be taxed more (albeit indirectly) and that more should be spent on public broadcasting. As such, they are public finance issues. The second complaint concerns the effectiveness, not the efficiency, of current policy. Regardless of whether there are more efficient alternatives, the general feeling is that current policies accomplish very little of value regarding the public interest performance of commercial broadcasters.

We will not deal herein with the question of how much should be spent on the public broadcasting system. Other than the implicit claim that more would be better, none of the four benchmark models offers a methodology for determining how much should be spent on public broadcasting. In addition, the optimal amount would vary with the contributions of commercial broadcasters, which would be different for each of these policy proposals. This observation is not a criticism of the benchmark models. As with health care, national defense, education, or virtually any other macro-level policy concern, there exists no practically implementable formal methodology for determining what level of commitment of public resources is optimal. Rather, spending levels are adjusted incrementally in response to general feelings that too much or too little is being spent to achieve various policy goals.

The Appropriate Level for Broadcaster Contributions

Only proponents of the spectrum check-off version of the obligation check-off pay-or-play model point to a methodology that they claim produces a valid financial measure of what broadcasters' public service obligations should be. While the 1 to 3 percent fees that would be collected on various revenue measures under the spectrum fee and play-plus-access approaches are magnitudes with which many people would feel comfortable, there are no first principles from which their proponents claim they are derived.

One proposal associated with the spectrum check-off approach would quantify broadcasters' public service obligations at the value the license for the least-watched station in a market might command in an auction.[12] The intuitive logic of this approach is that broadcasters benefit from free use of broadcast spectrum with a market value that greatly exceeds the cost of their current public service obligations. Because the right to use the broadcast spectrum is given away, its underlying value is a rent realized as a lump sum contribution to broadcasters' profits that can be collected as a tax without affecting the efficiency of their operations. Thus, the tax itself would be efficient. Use of the auction value of the least-watched station limits the risk to broadcasters that they would be unfairly taxed for their own contributions to the profitability of their operations. This type of protection is important, because if broadcasters were taxed on their own contributions to station profitability, this would constitute a tax on top of normal corporate income taxes that might discourage spending on broadcast services.

In our opinion, this approach to determining how much broadcasters should pay for the right to use the spectrum suffers from flaws both theoretical and practical. On the practical side, it fails to allow for differences in the value of different portions of the broadcast spectrum. The most obvious difference is that between UHF and VHF stations. VHF signals are clearer and carry farther than UHF signals broadcast with equivalent power. These differences are reflected in larger audiences, more network affiliations, and higher profits for VHF than UHF stations. In markets with both VHF and UHF stations, the least-watched station will almost always be a UHF station. Using its auction value as a measure of the underlying value of the licenses of all stations in these markets will leave a substantial portion of the value of VHF licenses untaxed. Of course, this problem might be addressed by making upward adjustments to reflect the greater value of VHF licenses, but these adjustments would have to be calculated on a market-by-market basis to reflect factors such as numbers of stations, degree of competition from cable, and viewer populations and demographics that are certain to vary substantially.

These practical problems with assessing the market values of television licenses can in principle be solved by developing more sophisticated estimating techniques; but flaws in the theory supporting this approach cannot. We see two problems for the theory. First, and least troubling, is the fact that there is no reason to assume that the least-viewed station in a market makes no contribution to its own profits over and above the value of its spectrum. If the limited spectrum allotted to television were not a constraint on the number of television stations in large markets, and if small populations didn't limit the number of broadcasters in smaller markets, this might be a reasonable assumption. But the number of television stations in most markets is constrained by one of these two factors. Therefore, there is no good reason to assume that the marginal broadcaster in a local market contributes nothing to the profits it earns from its spectrum. While this theoretical issue might be side-stepped with a different methodology for estimating the current market value of broadcast spectrum, better estimates of the innate present value of broadcast spectrum will not address our second, and more fundamental, objection to this approach to determining how much broadcasters should contribute. This objection is illustrated by the following example.

Consider a hypothetical broadcaster who held the license to a television station in a major market from the time it was first awarded in 1948 until it was sold for the first time in mid-1998 for $300 million. While the license was given away free in 1948, assume the owner would have been willing to pay $10 million for it, over and above necessary investments in equipment and programming, had it been auctioned off rather than given away. Now suppose that the same $10 million continually reinvested in safe financial instruments such as U.S. treasury bills would have earned a real (and predictable) rate of return of five percent annually over this period. With continual reinvesting in treasury bills, the $10 million would have grown to $114.7 million by 1998. In the recent sale, however, the station changed hands for $300 million.

How much of the current $300 million market value represents a gift by the government to the station's current owner? We would argue none, because the current owner paid full market value for it. Whatever the value of the giveaway, it was fully captured by the original owner. (This would be true regardless of how many times the station changed hands since the license was first awarded.) Suppose the value of the giveaway could be collected from the original owner—or the owner's heirs—even though the practical and legal barriers to doing so are likely to be insurmountable. How much should they pay? (Equivalently, how much should the owners of a station that has never changed hands pay?) While the case for collecting $114.7 million seems clear, the government's claim to any more of the current $300 million market value is far less obvious. The $10 million the original owners would have paid fifty years ago represented the probability weighted sum of the present values of many different possible futures. For those in which the station stayed in business the owner would have had to continually reinvest in the station as technologies changed and equipment depreciated—investments that likely also contributed to the current $300 million valuation. In one of these futures (the one observed), the value of the station would grow to $300 million by 1998; but if the market value was $10 million in 1948, there must have been other possible futures in which the value of the station failed to keep up with the compounding value of the equivalent investment in treasury bonds—possibly including futures in which the station would have lost money (a situation that characterized many UHF stations throughout most of the history of the television industry). From this perspective, collecting more than $117.4 million from the original owners would appear to be a tax on good fortune and initiative with no allowance made for the risks in broadcasters' commitments in accepting the initial TV licenses.

As this example makes clear, once a station has been sold, collecting the value of spectrum assets given away by the government from the current owner is inappropriate because the full value of the giveaway was realized by the very first holder of the license. All subsequent owners have behaved exactly as do business people investing in other assets—paying prices they thought to be fair reflections of future earning potential. Any attempt to collect the value of spectrum given away from current owners would undoubtedly be challenged as an illegal taking. Collecting the value of spectrum assets given away from original owners is complicated by the need to determine what the original market value would have been at the time a license was given away and the risk that should be attributed to subsequent investments in the station by the original owner. While it is certainly true that current license holders paid for licenses with public service obligations they knew could be changed at any time, this fact by itself provides no hint as to what the correct level of the obligations should be.

To our knowledge, the proposal that broadcasters be charged for the value of the spectrum given them by the government is the only attempt at a first principles approach to determining the value of broadcaster's public service obligations. As indicated above, we think this approach is flawed, perhaps fatally so, by conceptual and practical difficulties. On the other hand, the terms under which broadcast licenses are awarded allow for the possibility that broadcasters' public service obligations may be changed over time, as deemed appropriate by government authorities. This would seem to be justification enough for changing these obligations in ways that would better serve the public interest in broadcast services.

Efficiency and Effectiveness Considerations

As we noted earlier, the current public trustee model had been largely deemed a failure in dealing with content and access concerns, because it has proven to be ineffective in producing its hoped-for benefits. The reasons for the poor performance of the current public trustee model seem fairly clear. Many of the relevant performance requirements are hard to quantify (especially those relating to program content); those that are quantifiable in principle, such as LUR and equal-access requirements, are costly to monitor; the penalties for noncompliance are generally weak; and, because these requirements contribute more to costs than to revenues, profit-motivated broadcasters have every incentive to evade them when they can and to satisfy them in the least costly way that is minimally acceptable to regulators when they can't. For the most part, the proposals for an enhanced public trustee model are just more of the same. While the burden on broadcasters would undoubtedly be greater and additional public service would be provided, compliance problems and dissatisfaction with licensee performance are likely to be just as prominent features of enhanced public trustee requirements as with the current requirements.[14] We therefore ask whether elements of the other three benchmark models offer more effective approaches to achieving the goals of content and access policy.

Compliance issues would be largely eliminated under the spectrum fee approach, because all responsibility for public interest programming would be borne by an expanded PBS system. While it is true that expansion of the PBS system would be financed by a tax on station ad revenues and/or proceeds from station sales, and there would be an incentive on the part of station owners to minimize these taxes, the aggregates against which they would be levied are commonly reported and should be fairly straightforward to monitor. If a time bank were created to fund the purchase of commercials for political candidates and causes, as long as purchases were made at market rates, broadcasters would have no incentive to restrict the amount of time sold to political candidates and for public service announcements. The inefficiencies for which there should be concern arise from the possibility that a public broadcasting system with a monopoly on public interest programming would not be efficient in the use of the resources at its disposal.

The access portion of the pay-plus-access model should exhibit all the inefficiencies and compliance problems for access requirements of the public trustee model. As with the spectrum fee model, these agency issues would be eliminated for the public interest programming provided by a presumably expanded PBS; but the efficiency concerns associated with a single government supplier of certain types of programming in the spectrum fee model would have to be addressed.

The appeal of the two variants of the pay-or-play model is the efficiencies that might be realized through reliance on market-like incentives in the allocation of public interest obligations. Unfortunately, the success of both schemes rests on the ability of government to meaningfully quantify access and content obligations. With obligation check-offs, broadcasters would have the option of performing certain public service requirements themselves or paying either public broadcasters or a public authority (which would pay public broadcasters) to do them instead. Check-offs thus require specific dollar figures be applied to each performance requirement. As noted earlier, paying public stations to take over commercial broadcasters' access obligations cannot meet the goals for access policy if the effectiveness of political messages depends on their being received by larger audiences than are likely to be reached by PBS stations.

This concern aside, it is still not obvious that obligation check-offs would improve the efficiency with which public service obligations are carried out. If commercial broadcasters find it most profitable to meet their performance requirements themselves, there is no reason they shouldn't look for the least-cost options that minimally satisfy regulatory requirements. If commercial broadcasters were to contract with public stations to perform their public service obligations, it would be because public stations could save commercial broadcasters money, not because public stations could do a better job of satisfying the true public interest goals of content and access policy. If public stations competed for such broadcaster payments, this result would be virtually assured. While making payments to a public authority which would then commission public stations to fulfill commercial broadcasters' performance requirements would avoid this problem, it wouldn't eliminate the possibility of commercial broadcasters choosing to do their own public service programming on the cheap, and we would still have to contend with the implications for efficiency of having all public service programming provided by public stations that may not have the same efficiency motivations as commercial broadcasters.

The tradable obligations version of pay-or-play comes closer to employing a true market mechanism for allocating public service obligations because commercial stations could actually trade such obligations among themselves. Measurement problems are certain to be even greater for tradable obligations than for obligation check-offs, however, because now it would be necessary both to quantify the performance requirements of individual broadcasters and to establish the rates at which one broadcaster's performance requirements should be exchangeable for another's. For example, should one hour of public interest programming on a VHF station be worth more than an hour of similar programming on a UHF station, because the VHF station will typically draw a larger audience? Should the structures of local television markets and the types of programs affect the terms of trade? Unless assigned relative values closely reflect the true public interest in different types of content and access on different stations, trading in these requirements could lead to perverse results. For example, a single, little-watched UHF station could end up with all of a market's access obligations for political speech, because this would be the station for which the commercial opportunity cost of access time would be least. This is just one of many ways in which stations distinguished primarily by their superior ability to evade the true intent of public service requirements might end up performing the bulk of them if they were tradable.

As is evident, none of the four benchmark proposals have outstanding efficiency properties. Public trustee obligations have historically generated disappointing results because content obligations in many cases are not quantifiable, because performance is difficult to monitor in any case, and because the natural profit incentives of broadcasters lead them to find ways to minimize the cost of meeting their public service obligations rather than searching for ways to increase the effectiveness with which they are met. These incentive compatibility problems are largely eliminated by the spectrum fee model through reliance on an expanded public broadcasting system to perform most public service obligations. The improvement is contingent, however, on the effectiveness with which a monopoly public broadcasting system meets the same obligations. Furthermore, a time bank for purchase of ad time on commercial stations for political speech would be necessary to ensure wide reach for these messages. As a hybrid of the trustee and spectrum fee models, the pay-plus-access model shares the advantages and inefficiencies of both.

The obligation check-off version of pay-or-play would be more efficient than the current system to the extent that public broadcasters paid to perform the public service requirements of commercial broadcasters actually would do a better job in carrying them out. However, there is no guarantee that commercial broadcasters still wouldn't find it more profitable to perform these requirements themselves, but as cheaply as possible. In this case, obligation-check-off would have efficiency properties similar to those for the public trustee model. Furthermore, commercial time would have to be purchased from commercial broadcasters to ensure wide distribution of political messages. Obligation trading could lead to the most efficient broadcasters in each market dominating in the provision of public service and access programming. However, this market approach could just as easily lead to those broadcasters most efficient at avoiding the true intent of public interest requirements performing most of them.

A FIFTH ALTERNATIVE: PAY-AND-COMPETE FOR A PUBLIC BUYER

We have observed that the components of the four benchmark models might be viewed as items on an expanded menu of policy elements from which policymakers could choose in designing content and access policies. In this section, we describe a fifth model that we believe will do a better job of serving the ultimate goals of public interest programming than any of the four benchmark models, by combining certain elements of the spectrum fee, pay-plus-access, and pay-or-play models and adding a critical contribution of its own.

Most of the efficiency problems with the four benchmark models are consequences of private decision makers' personal interests being not fully compatible with the public's interest in their decisions. This occurs for several reasons. Under the public trustee model (current or enhanced), public service obligations are costs to broadcasters that subtract from the bottom line. Attempts to enforce public service obligations under this model will always have to fight against the inherent incentive of broadcasters to minimize costs of this type, especially when meritorious performance of these obligations is not rewarded in financial markets. This enforcement problem is compounded by the fact that, especially for content-related goals, quality of service cannot be meaningfully quantified, which makes monitoring compliance difficult and costly. The same problems plague the access requirements that would be retained under a pay-plus-access model. While compatibility problems with privateactor incentives are avoided by the spectrum fee model, it does not solve the efficiency implications of having a single public broadcasting service monopolize the provision of public interest programming.

The two versions of pay-or-play attempt to rectify the incentive compatibility problems of the other three models by relying on more market-like mechanisms. The primary problem with the tradable obligations version of pay-or-play is that it is likely to result in broadcasters competing to minimize the costs of their public service obligations, rather than competing by offering viewers better public service programming. The "government as buyer" flavor of the obligation check-off version of pay-or-play takes us part way toward a solution to this problem by putting each commercial station in a quasi-competitive situation with respect to the public broadcasters the government could pay to perform its public service requirements—should the station elect to pay rather than check-off the requirements by performing them itself. The government is not a fully empowered buyer, however, because quantification of the obligations that might be checked-off severely limits the government's ability to make the types of qualitative judgments buyers normally make in choosing among purchase alternatives. Because the government would not be able choose a qualitatively superior service provided by a public broadcaster over a similar service provided by a commercial broadcaster that just barely satisfied the quantitative guidelines, commercial broadcasters may still find it most profitable to take a cost-minimization approach to satisfying their public service obligations.

These problems with the two versions of pay-or-play disappear if "play" is eliminated as an option to pay. By itself, this change simply converts pay-or-play to spectrum fee. However, broadcasters could still be given the chance to earn back their public interest fees with various types of public interest programming and access commitments, but this time at the discretion of a public authority commissioned to develop and oversee public interest programming. This is pay-plus-compete for a public buyer. The public authority[11] would in essence be a buyer of public interest programming and access time, spending from a budget comprised of broadcaster payments plus funds available from other sources, such as government funding and private donations. Commercial broadcasters would have the option of competing with public stations and with each other to supply these services, with the outcome of these competitions decided by the public buyer's assessment of the comparative merits (which could include price, audience reached, and subjective evaluations of quality) of competing offers.

The primary advantage of the pay-plus-compete for a public buyer model is that it turns public service obligations into opportunities for profit that would enlist the natural incentives of competitive markets on behalf of the goals served by public interest broadcasting. It would also make the cost of public service much more transparent than models that would impose performance requirements on broadcasters without ever calculating the opportunity costs to broadcasters of carrying them out. In this regard, we would require the public authority to pay market-negotiated prices for access time, rather than LUR as proposed for other models. Price discrimination is a natural feature of competitive markets, and if a public authority or political candidates can't negotiate time sales at LUR, it must be because they, like most other ad buyers, are unable to make offers to broadcasters as attractive as buyers paying LUR.[15] It is frequently argued that the high cost of ad time unreasonably escalates the costs of political campaigns. However, if ad time has economic value, then forcing broadcasters to make time available for political messages at rates below what otherwise similar buyers would pay doesn't lower the cost of political campaigns, it just shifts part of the cost from politicians to broadcasters. The fact that the public benefits from additional political speech would exceed the public benefits from the commercial speech it would displace is not in itself justification for forcing broadcasters to bear these costs. In reality, if political messages are undersupplied, the problem is not that campaigns are too costly, but that they are underfunded relative to the benefits the public would realize if more resources were devoted to them. Whatever obligation is deemed appropriate for broadcasters should be fully reflected in the public service fees assessed against them.

With the exception of restricting viewers' access to alternatives to public interest programming, the pay-plus-compete for a public buyer model just described is sufficiently flexible to address all issues of structural appropriateness raised in section I. For example, in addition to programming, the public buyer could use its expanded budget to purchase (or subsidize the purchase of) access to ad time on commercial stations to ensure that political messages reach commercial broadcasters' large audiences. Similarly, ad time could be purchased to promote public interest programs to a wider audience than is now the case. The expanded budget would also make possible more attractive public interest programming that might counter, to some degree, viewers' neglect of their own and the public's long term interests in what they watch. Finally, programming that remedies the informational deficiencies of the messages supplied on behalf of candidates and ballot initiatives could also be commissioned, if this was politically feasible.

SUMMARY AND CONCLUSIONS

General and long-standing dissatisfaction with the results of the policies that set and govern commercial broadcasters' access and content obligations has made these policies the subject of continual debate and the object of repeated attempts at reform. The impending transition to digital television has intensified this debate and is hoped by many to be an occasion for making meaningful changes from the current policy approach. This chapter described a framework for evaluating access and content policies from the perspectives of structural appropriateness and efficiency. Assessments of structural appropriateness reflect the degree to which policies that might be implemented actually address various performance failures of participants in broadcast markets and the political system that access and content policies are supposed to rectify. Effectiveness and efficiency evaluations are concerned with how much is accomplished, or likely to be accomplished, by these policies, and whether there are alternative approaches that might substantially improve on their performance. This framework was used to evaluate four benchmark models for reforming access and content policy that were identified in previous work by the Aspen Institute Working Group on Digital Broadcasting and the Public Interest. It also served as the basis for a fifth model for reforming these policies, which was proposed in this chapter.

The structural appropriateness of any particular set of content and access policies can be assessed in terms of whether the policies directly address either the causes or consequences of four broad types of failures attributed to political and market actors. These are: (1) the failures of viewers to adequately reflect their own and the public's best interest in the viewing choices they make; (2) the failures of profit-motivated commercial broadcasters to provide adequate amounts of certain types of programs that can make important contributions to the knowledge base that should inform policy debate and voting in a democratic society; (3) the perceived tendencies of markets for broadcast commercial time to undersupply time for political ads and to oversupply time for commercial ads relative to social benefits realized from the two types of ads, and to sell too much time to incumbents and establishment candidates generally compared to their electoral challengers; and (4) the tendency of political actors to provide less information generally and less-objective information about themselves and their positions than voters need to make informed choices. No single benchmark model was clearly superior to the others in terms of structural appropriateness alone. Each of the benchmark models addressed the major structural concerns in one way or another, with two notable exceptions. First, none of the models directly addresses the problem of political actors supplying too little or biased information; but since proposals to address this deficiency would have to be approved by the political actors who would be affected by a change in policy, there may be no politically feasible solution to this problem. Second, none of the four benchmark models deals head-on with the possibility that it may be necessary to limit viewers' programming options to get them to meaningfully increase their consumption of programs for which the societal benefits exceed the immediate personal consumption benefits. Because viewers are also voters, solutions to this problem depend on voters showing greater appreciation for the long-term consequences of their choices among political candidates and television policies than they do in their daily decisions regarding what to watch on television. The fifth model proposed in this chapter is similar to the other four in terms of structural effectiveness.

The four benchmark models differ most in their efficiency properties. Broadcaster compliance has always been a problem for access and content policies in the past, and it remains an important problem today. That the current approach is beset by compliance problems should not be a surprise. Many, if not most, of the performance objectives set for broadcasters under current policy cannot be effectively quantified nor objectively measured. This makes it difficult and expensive to monitor compliance. Furthermore, these requirements are costly to broadcasters both in terms of resources contributed and revenues foregone—and these costs increase the more effectively broadcasters carry out their public service obligations. Therefore, profit-motivated broadcasters are driven by their own self-interests to evade those public interest obligations they can and to satisfy those they can't evade at the lowest cost possible—which generally means at the level of quality just sufficient to avoid the opprobrium of regulators.

One of the four benchmark models would reform the current public trustee approach by asking broadcasters to do more to serve the public interest. Because this model is similar in its basic design to the current approach, we would expect it to be beset by similar problems. Each of the three remaining benchmark models takes a different approach to addressing the incentive compatibility problems of the public trustee model. The spectrum fee model would simply charge broadcasters a fee for using the spectrum and use the funds generated from these fees to support public interest programming by public broadcast stations. While the self-interests of public broadcasters are not inconsistent with the goals for public interest programming, it is an open question how efficiently monopoly public broadcasters would carry out the public service obligations that traditionally have been assigned to commercial broadcasters. In addition, the effectiveness of political speech may depend on the broad dissemination of political messages, which may not be possible if political ads are confined to the generally lightly viewed public channels. The pay-plus-access model would address this problem by adding to the spectrum fee model a requirement that broadcasters make a certain amount of ad time available to political candidates.

Two variants of a pay-or-play model for access and content policy reform would try to improve the performance of commercial broadcasters' public service obligations by giving commercial stations the option of either performing their public service obligations themselves or paying other stations (either public or private) to carry them out. In our view, it is possible that these approaches may be able to generate market-like efficiencies in serving the public interest in television broadcasting. There is also a very strong possibility, however, that the end result of the types of arbitrage these models make possible will be public interest programming provided primarily by those stations that are most efficient at evading the true goals of access and content policies. The possibility of these adverse outcomes arises from the need to quantify what are inherently nonquantifiable performance goals to facilitate exchanges under the two variants of pay-or-play. Pay-plus-compete for a public buyer, the fifth model proposed in this chapter, addresses the quantification problem by empowering a public agency to purchase the programming required to meet the goals of access and content policy and, in doing so, to make the kinds of subjective judgments employed by buyers in commercial markets every day. As with the spectrum fee and pay-plus-access models, commercial broadcasters would contribute to the public agency's budget through a spectrum use fee (which we do not think should be equal to the current market value of the spectrum); and, as with pay-or-play, broadcasters would have the chance to earn back their contributions through programming and commercial time sold to the public agency—but in a competitive market in which public broadcasters could also compete for these funds. By turning public service obligations from a pure cost to a revenue opportunity, and by empowering the public agency to select among competing proposals on the basis of how well they address the goals of access and content policy, the profit motive that promotes efficiency in competitive markets could be harnessed on behalf of public interest programming.

Endnotes

1. See Sections I and II of this volume.

2. Here, and for the remainder of this chapter, the term "public interest programming" is broadly defined to include all televised content, whether in programs or in commercials, that serves a public interest in addition to the immediate commercial value of programming.

3. This kind of opportunity cost is very broadly construed to include the value of both political and economic options foregone to put a given policy in place.

4. A more complete listing of reasons why viewers' programming choices may fail to fully serve either their personal interests as consumers or the larger social interest in their choices is provided in Andrew Graham's chapter in this volume.

5. See A. M. Spence and B. M. Owen, "Television Programming, Monopolistic Competition and Welfare," *Quarterly Journal of Economics* 91 (1976): 103–126; B. M. Owen and S. S. Wildman, *Video Economics* (Cambridge: Harvard University Press, 1992); and S. S. Wildman and B. M. Owen, "Program Competition, Diversity, and Multichannel Bundling in the New Video Industry," in *Video Media Competition: Regulation, Economics, and Technology*, ed. Eli Noam (New York: Columbia University Press, 1985).

6. The validity of this fear rests on at least two assumptions, both of which are open to honest questioning. First, it rejects the possibility that individual voters might find it useful to take into account other prospective voters' assessments of the merits of a candidate or ballot initiative in forming their own opinions and that the quantity of ads for a candidate or issue works as a gauge of the amount of support it does or will command. To our knowledge this possibility has not been empirically tested, but it is consistent with recent theoretical modeling of information cascades. See, e.g., Sushil Bikhchandani, David Hirshleifer, and Ivo Welch, "Learning from the Behavior of Others: Conformity, Fads, and Informational Cascades," *Journal of Economic Perspectives* 12, no. 3 (summer 19998): 151–170.

   Second, it assumes that messages either gain in credibility the more frequently they are repeated or that voters are less likely to remember ads for candidates who advertise least, irrespective of the merits of the messages presented. There is some empirical evidence in support of this concern, as research into how voters analyze candidates suggests that during campaigns, stereotypes and impressions may have more influence than issue-related information—especially for less-knowledgeable or less-motivated voters, who are more likely to be influenced by political "spot" advertising. See, e.g., Marion Just, Ann Crigler, and Lori Wallach, "Thirty Seconds or Thirty Minutes: What Viewers Learn from Spot Advertisements and Candidate Debates," *Journal of Communication* 40, no. 3 (summer 1990): 120–133; and Robert S. Wyer, Jr., and Victor C. Ottati, "Political Information Processing," in *Explorations in Political Psychology*, ed. Shanto Iyengar and William J. McGuire (Durham, N.C.: Duke University Press, 1993).

7. This possibility is more fully discussed in Robert M. Entman and Steven S. Wildman, "Reconciling Economic and Non-Economic Perspectives on Media Policy: Transcending the Marketplace of Ideas," *Journal of Communication* 42, no. 1 (winter 1992): 5–19.

8 This is not to say that the merits of public service obligations have not been questioned. See, e.g., Mark S. Fowler and Daniel L. Brenner, "A Marketplace Approach to Broadcast Regulation," *Texas Law Review* 60, no. 2 (February 1982): 207–257.

9 E.g., program and message sponsors would have to be identified and the current prohibitions on payola and rigged quizzes would be retained.

10 It is also argued that this reduced set of requirements for broadcasters would make broadcast regulation more similar to that of cable, and thus make more level the playing field on which the two media contend. Given that the two media are regulated very differently on a number of dimensions, it is hard to assess the validity of this claim.

11 See Henry Geller, "Implementation of 'Pay' Models and the Existing Public Trustee Model in the Digital Broadcast Era," in this volume.

12 See the more fully elaborated version of this model in Todd Bonder, "A 'Better' Marketplace Approach to Broadcast Regulation," *Federal Communications Law Journal* 36 (1984): 27–68.

13 An exception is the proposal that looser equal-time requirements be part of an enhanced public trustee model. This is to make it less costly for broadcasters to air controversial programming (the opportunity cost of reply time is reduced) in hopes they will respond with more issues-oriented fare. This revision would at least partially correct an inefficiency due to a design flaw in the equal time requirements of the current trustee model.

14 The public authority could be a specially designated nonprofit entity as well as a government agency. There is also no reason why multiple public authorities with different public service missions couldn't share the overall budget for public service programming and access time.

15 Features justifying LUR prices are most likely features of ad buys, such as bulk purchases and long-term commitments, that reduce the financial risk in ad inventory for the seller.

Implementation of "Pay" Models and the Existing Public Trustee Model in the Digital Broadcast Era

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Four models for digital broadcasting were discussed at the January, 1998, meeting of the Aspen Institute Working Group on Digital Broadcasting and the Public Interest.[1] This paper identifies and addresses issues of implementation for three of those models: the spectrum fee (pay/public broadcasting) model; the pay plus access model; and an improved version of the current public trustee model. The paper briefly summarizes each model, addresses its main implementation issues, and assesses the major obstacles to its implementation. In view of uncertainties about how broadcasters will operate in the digital era, the discussion necessarily cannot be definitive. Rather, my purpose is to set forth an analysis that will be helpful for pragmatic consideration of the three approaches.

THE SPECTRUM FEE OR "PAY/PUBLIC BROADCASTING" MODEL

Description of Model

The spectrum fee model outlined in the Aspen Institute report by Angela Campbell would eliminate the public trustee content obligation, which requires broadcasters to act to foster the public interest.[2] In its place, the spectrum fee model, or "pay/public broadcasting" model as I will refer to it, would impose a spectrum usage fee on the gross advertising revenues of stations and station sales; the sums so obtained would go to a trust fund for public broadcasting and, in connection with campaign finance reform, a political time bank. Particulars of the fee would be set out in a long-term franchise agreement between the Federal Communications Commission (FCC) and the broadcaster.

The rationale for this approach is as follows:

1. The public trustee content scheme has been a failure (e.g., postcard renewal except for children's television, inability of regu-

lation to consider the real goal—high-quality public service programming); with increasing fierce competition from cable, DBS (direct broadcast satellite), and other electronic media in the digital era, the situation will worsen. Market deficiencies exist (e.g., the need for a ready-to-learn channel, school-age programming, adult learning, literacy, etc.); public broadcasting can supply such high-quality educational, cultural, and in-depth informational programs in the digital milieu, but it lacks resources for sustained programming and promotional efforts. The pay/public broadcasting approach would thus establish a structure working for the achievement of high-quality public service, rather than the failed behavioral regulatory scheme now used as to commercial broadcasting.

2. The pay/public broadcasting approach would largely remove First Amendment strains. Broadcasting would join other media, which are already treated under traditional First Amendment jurisprudence.

3. The pay/public broadcasting approach would end the asymmetric regulation of the two most powerful forms of television distribution—broadcasting and cable. The viewer makes no distinction between the two.

4. The pay/public broadcasting approach would fit the trends of the next decade and century. Enormous change is coming rapidly—hundreds of channels in digital cable or DBS or telecommunications (from servers) or the Internet. It makes no policy sense to single out broadcasting for this behavioral content scheme—to continue the policy adopted over seventy years ago in a completely different environment.

Implementation Issue #1: How Much?

The most recent figures (1997) for the gross advertising revenues of commercial TV stations show $9,999 million for spot advertising and $11,436 million for local advertising, totaling $21.4 billion. Sales figures for broadcast stations in the last two years are $23.4 and $25.36 billion. Since the latter figures will vary from year to year, I use here a figure of $20 billion for broadcast sales. The percentage figure I use is directed to these gross revenue amounts to avoid the quagmire encountered when focusing on profits, a focus that simply results in much "gaming" of the system.

The percentage is necessarily somewhat arbitrary. In the case of cable, Congress, following the lead of the FCC, decreed in the 1984 Cable Act that the franchising authority (e.g., cities) could impose a franchise fee of up to 5 percent (and cities have imposed varying fees up to that maximum) for the use of the city streets. Here the fee structure for use of the spectrum must be one that is reasonable and modest, so that it is not deemed burdensome to industry operations, including sales of broadcast properties. I therefore suggest what could be called the "2-percent solution"—namely, 2 percent of gross advertising revenues and 2 percent of sales transactions, fixed in the long-term franchise so that it does not change during the duration of the franchise contract between the FCC and the commercial broadcaster.[6] Significantly, Senator Ernest Hollings several years ago introduced legislation that would have used a 4 percent figure in connection with station transfers.

It has also been suggested (by some commercial broadcasters) that government revenues obtained from the fee imposed on ancillary ATV (advanced TV) operations should go to support public broadcasting. This would be a worthy further supplement to the above. The FCC is now in the process of determining how to calculate the ATV fee scheme; in light of that uncertainty and—much more important—the complete uncertainty as to the amount and extent of such ancillary operations, no estimate can be made of what revenues might accrue to public broadcasting from this approach.

Implementation Issue #2: How Long?

From the standpoint of communications policy, the duration of the above scheme would depend upon political considerations. Thus, if the Republican Congress continues to have as a goal the elimination of government funding of public broadcasting and its replacement with an adequate trust fund, the 2-percent solution could end in about four years, when the trust fund would have accumulated roughly $5 billion. Thereafter, whether the 2-percent approach continued (i.e., whether it wants to emulate the cities) would be a matter for Congress to decide.

If, as a part of campaign reform, a political time bank were to be established along the lines of the Taylor-Ornstein-Mann proposal,[8] the fees would need to continue indefinitely, but at a reduced rate (after the above period to establish the public broadcasting trust fund). Since the proposal estimates a need for roughly $500 million every two years (but keeping pace with inflation), the fee would be reduced to a little more than 1 percent on revenues and sales (or alternatively, 2 percent on revenues alone, eliminating the uncertainty that comes with reliance on station sales). Depending on when campaign finance reform were to be instituted, there might be the need for an additional 1 percent for this purpose, during the four-year period to build the trust fund.

There are, of coursé, many variations on the above theme. Thus, there could be a 1-percent solution for public broadcasting if Congress decided against the trust fund—that is, public broadcasting would receive 1 percent of revenues and sales each year, to be used largely for educational programming (defined broadly to include cultural fare). This $400 million sum would replace the Congressional appropriation process, and would continue for the duration of the franchise contract. At that point, there would be a sunset, and reevaluation of both the continuation of the fee and its dedicated use.

Broadcaster Obligations under this Approach

As stated, there would be no public interest content regulatory scheme such as the present requirements for fairness rules, community issue-oriented programming, or children's educational/informational programming (hereafter called core children's TV programming), including programs specifically designed for this purpose. Rather, the broadcast licensee would come under the Title III regime in roughly the same way as, say, a cellular or PCS radio licensee. All radio licensees come under a public interest standard, must show that they are legally, technically, or otherwise qualified (e.g., character, citizenship), are subject to forfeiture or cease and desist orders for violations of the Communications Act or rules, and can be denied renewal or be revoked for willful and repeated violations of the Act or rules.

The broadcaster would face continued application of provisions such as sponsorship identification (Section 317 of the Communications Act), no rigged quizzes, the ban on payola, and the prohibition in 18 U.S.C. 1464 on obscene or indecent programming (see also Section 312[a][6]).[9]

Significantly, there would continue to be content regulation in the political broadcast field, because without such regulation there would be little chance of Congress moving the necessary legislation. Thus, Section 315, requiring equal opportunities for legally qualified candidates (and prohibiting censorship of the candidates' use of station facilities), would be retained.[10] The equal opportunities requirement should be modified to apply only to paid time; if that approach is rejected, then the requirement should be revised to apply to significant candidates, defined very liberally (see 48 FCC 2d 46 for the 2-percent/1-percent proposal). Alternatively, there could be a broad exemption for bona fide broadcast journalistic efforts under the control of the licensee and not designed to serve the political advantage of any candidate.[11]

There is also the issue of lowest unit rate (LUR) and its allied provision, Section 312(a)(7), requiring reasonable access for candidates for federal office.[12] If a political time bank is created as part of campaign finance reform, LUR would be eliminated; however, to ensure that those receiving the time bank funds could use them for broadcast exposure, a reasonable access requirement would be broadened to cover all such candidates (although as a practical matter, broadcasters should be eager to get back the monies [the spectrum usage fee] that went into the political time bank). If no political time bank were created, Congress might well insist on retention of LUR and 312(a)(7).

The constitutionality of the above retained provisions would now fall not under the liberal and flexible standard of *Red Lion* but under traditional First Amendment jurisprudence (which does take into account the characteristics of each medium). Stated differently, broadcasting would be treated under the same First Amendment jurisprudence as cable.[13] I believe that the provisions would be found to be constitutional. Thus, the equal opportunities provision, as revised, would not interfere with broadcast journalistic efforts, and in assuring equal treatment for significant candidates, would serve in a narrowly tailored and least restrictive fashion a substantial, indeed a compelling, governmental interest in light of the overarching importance of television for so many campaigns. Similar considerations would apply to LUR or reasonable access.

Multiple ownership rules would also continue to be applied. These rules reflect the diversification principle—that the underlying assumption of the First Amendment is that the American people receive information from as diverse and antagonistic sources as possible (*Associated Press v. U.S.*, 326 U.S. 1, 20 [1943])—and have been promoted by the Congress on several occasions. They apply also to cable (see Sec. 613, 47 U.S.C. 533), with their constitutionality still being fought out in court appeals. Such rules are content-neutral, and thus their constitutionality would come under the intermediate standard of O'Brien, a test that they would meet, in my opinion.[11]

Reform of Public Broadcasting

Under the pay/public broadcasting approach, especially with the use of the trust fund, there is a need to reform the public broadcasting scheme, for example, as to its governance and heightened focus on serving local needs. These issues have been treated in a number of studies, most recently in *Quality Time?*, the 1993 Report of the Twentieth Century Fund Task Force on Public Television.[15] Since that is not the focus of either the Advisory Committee or the Aspen group, I will not pursue such reforms here.

Key Players, Obstacles, Assessment

The key player is of course the Congress, since only it can effect the sweeping reform here urged. There would be significant opposition within Congress. Some liberal elements would oppose any elimination or diminution of the public trustee content requirement. Some conservative elements would oppose any strengthening of public broadcasting. One powerful member, Chairman Billy Tauzin, has stated that there should be a shift from focus on commercial broadcasting to public broadcasting for public service; that the latter should have increased financial support through a trust fund; and that he will introduce legislation to this effect (see H.R. 4067, 105th Congress, 2d session, Public Broadcasting Reform Act of 1998).

There might well be a majority for the pay/public radio approach in radio broadcasting; it makes little policy sense to be regulating radio broadcasting today as a public trustee, when so many of the stations are simply electronic juke boxes, with very short talk interruptions and commercials. Whether a majority might exist in the case of television is more problematic, even assuming the matter were considered on its merits. Congress might well want to try this approach first with radio, and if successful, move on to television as the number of channels available grows explosively in the digital era.

However, there is little likelihood that the matter would be decided on the merits. The commercial broadcast lobby has enormous clout, as evidenced in the *1996 Telecommunications Act*, which gave broadcasters many "goodies" (ATV channels reserved for existing broadcasters and with no auction; elimination of comparative renewal hearing; lengthening of license terms for TV; and relaxation of multiple ownership limits, drastically in radio and somewhat in TV (an increase to 35 percent national audience limitation). Senator John McCain, who opposed the ATV "giveaway" (in his words), stated that the broadcast lobby was the most powerful that he had encountered, and Speaker Newt Gingrich (R–Ga.) has acknowledged its power.

This lobbying force constitutes the largest obstacle to adoption of the model under discussion. The broadcasters, represented by the NAB, like and will fight for retention of the public trustee model—the social compact, as they put it, under which they are obliged to render public service rather than put profits first.[16] Indeed, in 1994 in the 103rd Congress, on this ground, the NAB successfully opposed a spectrum usage fee (1 percent of gross revenues rising to 5 percent), advanced by the administration to gain needed revenue.[17]

While the odds would remain quite high against gaining broadcaster support for the approach, the following "carrots" and "stick" might be helpful in that respect:

1. Lengthening the franchise term to 15 years.[18] There is little downside to this. Broadcasters, like PCS or cellular licensees, really have licenses in perpetuity. If there were some egregious pattern or occurrence, revocation remains available.

2. Offering to raise the national audience limitation in TV to 45 percent. While it can be argued that this leads to greater concentration, the fact is that on the national level, the diversification principle is now well served; there are many sources of information, electronic and print, on any significant national issue. It is on the local level, with important local issues, that diversification remains so important.[19]

3. Imposition of new and more concrete obligations in the digital era would be avoided, with the adoption of the pay/public broadcasting approach.[20] This possible "stick" has already been discussed.

The odds are against implementation of the pay/public broadcasting model in the near future (during the 105th or the 106th Congress). Because, however, it so much fits the driving trends, the model should be advanced, with the idea that as the trend becomes ever more apparent in this dynamic field, the need to abandon the existing scheme, so outmoded and ill-suited to prevailing circumstance, will be heightened.

THE "PAY PLUS ACCESS" MODEL

Description of Model

As described in the Aspen Institute report by Angela Campbell, the pay plus access model would relieve broadcasters of public interest program obligations except for certain types of access programming, and in return, assess a fee as in the spectrum fee model. This approach addresses one of the criticisms of the spectrum fee model, that is, that candidates' speech ought not to be relegated to channels that people need to seek out.[21] To make candidate speech widely and easily available, commercial broadcasters would be required to "ventilate" their program schedules by providing some specified amount of time to candidates in the period prior to elections. A certain amount of time might also be available for leasing by third parties to promote a diversity of viewpoints. In addition, commercial broadcasters could be required to promote and provide linkages to the subsidized programming on the public television stations, so that more people would be aware of these sources of information and education.

Implementation Issue #1: Requiring Free Time for Candidates

The proposed "ventilation" requirement of free time for candidates was not discussed at the first meeting of the Aspen Institute Working Group on Digital Broadcasting and the Public Interest. The second meeting focused specifically on this issue, and to that meeting, Tracy Westen, the main proponent of the "pay plus access" model, contributed an ambitious and detailed proposal.[22] The proposal is tied to campaign finance reform—that is, any candidate accepting the substantial free time would have to agree not to purchase any additional time (with certain limited exceptions).[23] The proposal is thus in the same league as that of Paul Taylor, executive director of the Alliance for Better Campaigns, that was advanced at the same meeting. As already noted, it is a matter for Congress to determine how to implement campaign reform—whether along the lines of proposals by Taylor and Westen, what I have proposed for simplicity, or some other way.

There is thus full agreement between proponents of these two models (spectrum fee and pay-plus-access) that substantial free time in conjunction with campaign finance reform should be sought. There is, however, a difference as to how to effect this most desirable goal. Under the proposals of Taylor and Westen, the broadcaster remains a public trustee (or a limited trustee), having to afford free time, with the constitutionality of the free time requirement tested under *Red Lion*. Under my approach, in which the broadcaster is no longer a public trustee as to public service content, a spectrum use fee is employed to obtain the sums needed for substantial free time, and government regulation focuses on the broadcaster's responsibility to afford reasonable access to a candidate using the political time bank. The latter requirement would be tested under the traditional First Amendment jurisprudence (and probably never tested in court, as the broadcaster, in the digital world, would undoubtedly be glad to get the money back by selling time). It therefore would be worthwhile to consider what is the most appropriate way to implement the same goal—a political time bank in connection with campaign finance reform.

Since it is so connected, the matter is clearly dependent on the Congress. Experience shows that it would be most difficult to effect without some marked change in the political climate. The broadcasters are strongly opposed, and have demonstrated their strength in this Congress when even a very modest amount of free time was dropped from the McCain-Feingold bill because of broadcaster opposition. Campaign reform itself (without free time) remains most problematic.

Nevertheless, in my opinion, the proposal for free time should be strongly advanced, because it is right, and, in the long run, might well come to pass.

Implementation Issue #2: Requiring Leased Access

The pay plus access model is similar to the cable leased channel provision (Section 612 of the Communications Act). The latter has been so hedged with limitations that it has never been successful,[24] and the FCC's latest attempt to implement Section 612 appears flawed.[25] A much better way to proceed is to require the broadcaster to engage in last-offer arbitration if no agreement on terms is reached after a stated brief interval; the programmer would thus gain immediate access during the arbitration period after posting a bond to ensure financial performance. Since the purpose is to promote the diversification principle (*Associated Press v. United States*, 326 U.S.1, 20 [1945]), the broadcast would have no control of the lessee's content, other than the power to bar obscene or indecent material.[26]

This provision would be consistent with elimination of the public trustee content scheme, and indeed would promote symmetrical regulation of broadcast and cable. In the ATV era, the broadcaster, especially outside of prime time, may well engage in multiplex operation (four to six channels), and in those circumstances, some significant amount of time on one of the channels could be reasonably set aside for third-party leasing. Such leasing has been held to be constitutional as to cable,[27] and indeed has been cited as helpful with respect to First Amendment considerations.[28]

Congress would be the key player in its adoption, since the FCC has no authority to make a broadcaster operate as a common carrier, even for a relatively small amount of time. (See Sec. 3[h] of the Communications Act). Broadcasters would strongly oppose such a legislative proposal, arguing that in broadcasting, licensee control is fundamental; that even in cable, the leased commercial requirement does not "kick in" until the system has thirty-six or more channels, and broadcasters will have at most six channels; and that no one can say with any certainty whether there will be extensive multiplex operations, so that the whole notion is premature and speculative (the counter-argument to that is that once the operation becomes established, it will be most difficult to impose a leased channel modification, as the cable experience shows).

In my opinion, there is little likelihood that such a proposal would be enacted in the near future. It is thus a long-term proposal.

Requirement to Promote Subsidized Programming on Public TV

This would appear to be a public trustee content proposal—a public service announcement (PSA) whose content is dictated by government for public interest reasons. The pay/public broadcasting model is meant to abandon the public trustee regulatory scheme, and bring broadcasting under traditional First Amendment jurisprudence. Under such jurisprudence, strict scrutiny would apply, and would probably doom the proposal. For if sufficient money were obtained for public broadcasting, it could engage in its own promotional activities, and there would be no need to interfere with the editorial autonomy of the commercial broadcaster.

Under pay plus access, the commercial broadcaster may be deemed a *limited* public trustee, and thus it could be argued that *Red Lion* is applicable and the requirement can be sustained under that flexible standard. Perhaps so, but I question why the public trustee scheme should be retained for this quite narrow purpose, when monies extracted from the commercial system (the spectrum usage fee) could enable the public broadcaster to accomplish roughly the same goal.

THE PUBLIC TRUSTEE MODEL

Description of Model

The public trustee model would apply the current public trustee obligations to ATV operations (e.g., community-issue oriented programming; children's educational and informational TV programs, including "core" programs specifically designed to educate; equal opportunities and LUR; and reasonable access for candidates for federal office). If the ATV broadcaster engaged in multiplex operations, there could be improvements to the current approach—e.g., making the three-hour guideline for core educational programming applicable to each of the multiplex channels; devoting one channel (4 Mbs) to public service. Some urge an improvement making concrete the public service requirement (i.e., a quantitative guideline for local and informational program). There is also the Common Cause petition pending before the FCC that requests a very modest amount of free time (twenty minutes, with three to five minutes in prime time) thirty days before the general election. Other suggested improvements include reinstituting ascertainment, repealing "postcard renewal," restoring the fairness doctrine, and extending equal opportunities to ballot issues.

Implementation Issues and Evaluation: Restoration Policies

Some of the above proposals (e.g., ascertainment, repeal of postcard renewal, quantitative guidelines for renewal, and restoring the fairness doctrine) do not stem at all from the move to ATV operations, but rather seek to repair the damage done to the public trustee obligation during the decade of the 1980s. Certainly there is a very strong argument that postcard renewal is simply deregulation because the public cannot be expected to, and does not, examine licensee files and then petition the FCC; the licensee should be held accountable through appropriate filings at renewal (as is the case under the Children's Television Act [CTA]). Cogent arguments also exist regarding the fairness doctrine: that the first duty (to devote a reasonable amount of time to issues of public importance) should be enforced, especially as to local issues; and that the second duty—to be fair—should apply to ballot issues, which are of great importance in states such as California and Washington.[29] Further, just as in the case of the CTA, there should be a processing guideline informing the licensee and the public what constitutes a "safe haven" for renewal.[30]

The counter-arguments to this position have already been set out in the discussion on the spectrum fee model; that continuing and restoring the public trustee model would be to focus on the near term and not taking into account the trends of the next century.[51] Stated differently, it would be a huge fight to effect this restoration—yet this approach misses the much larger and more important goal of adopting a regulatory scheme that will actually provide high-quality public service programming, especially in the crucial educational area.

As to implementation, Senator McCain and others have argued that the FCC has no authority to adopt any new content requirement—that such action is for Congress alone. But clear legislative history and judicial precedent establish the FCC's comprehensive authority to flesh out the broad public interest standard precisely because this is such a dynamic field;[52] the McCain position stands on its head the very reason for the original creation of the FCC. Furthermore, each of the above proposals is a restoration of policies that the FCC adopted and adhered to for many years. The FCC *does* have the authority to act again as to these areas.

However, whatever the merits, broadcasters would likely seek to have Congress halt this restoration, either through direct legislation or appropriation riders. Broadcasters would certainly have considerable support as Congress is now constituted. A very important factor here would be the attitude and actions of the executive branch—whether it would threaten or exercise a veto. It is not possible to reach any conclusion as to that factor.

Finally, as the focus of the President's Advisory Committee is on public interest obligations in the digital era, it is therefore questionable whether the Committee would want to focus on the past or present (analog) situation, even acknowledging that this situation will dominate broadcasting for the next five years or so, and the counterargument that the future (digital) scheme should be built upon the bedrock of a sound present (analog) regulatory pattern.

Implementation Issues and Evaluation: Innovative Improvements

Equal opportunities, LUR, and reasonable access for candidates for federal office would all be applicable to ATV operations. Initially candidates will have little or no interest in such operations because the audience, compared to the analog audience, will be too small. As the audience becomes significant, though, candidates will seek access/LUR, and the FCC's detailed rulings will be applicable, subject to revision as experience is gained in the digital era.

The issue as to the CTA/three-hour guideline is more difficult. First, initially it would be poor policy to require three hours of core programming on each multiplex channel. Such programming is expensive and requires considerable planning and development. To require, say, 15 or 18 hours of core programs, when the digital audience is miniscule, would be arbitrary. Second, even when there is a substantial ATV audience, requiring the commercial broadcaster to present amounts of core programming as high as 15 to 18 hours would result in spreading resources much too thin; either quality would go way down, or there would be a tendency to focus on social-purpose themes with the real emphasis on entertainment. It may be that as broadcasting progresses deeply into the ATV age, some revision of the three-hour guideline should take place, perhaps to five or six hours. But any such revision by the FCC should await future developments and be based on a solid factual ground.

The Common Cause petition is a modest but worthy improvement, both today (analog) and certainly in the digital era when there will be much greater capacity.[55] As the pleading stresses, it is not designed in any way as a part of campaign finance reform (and would obviously be wholly inadequate on that score). Rather, it would impose a duty on the broadcaster as public trustee to afford a very modest amount of free time (twenty minutes with five in prime time for the thirty-day period before the general election) in races chosen by the broadcaster. There are races that are of considerable importance locally in which candidates do not seek broadcast time, because it is too expensive for them. Broadcasters, perhaps consulting among themselves, could afford to provide a needed "electronic soapbox" for such races. However, the petition makes clear that the choice of what races to bring within this "five-minute fix" is solely within the discretion of the licensee.

I believe that the FCC has the authority to adopt the above approach under the broad public interest standard. But it must be acknowledged that the controversy over the much more ambitious proposal to afford a great deal of free time for campaign finance reform has made many in Congress very sensitive about any notion of free time at all. Strong Congressional leaders like Chairmen McCain and Tauzin would likely continue their opposition. This makes it unlikely that the Common Cause proposal will go forward. Why fight a huge battle over such a modest gain?[55]

The most interesting innovation stems from the digital nature of ATV operation—that it really constitutes 19.4 Mbs so that when the broadcaster decides to engage in multiplex operation, 3 or 4 Mbs could be required to be used exclusively for discharge of its public service obligation. The broadcaster could be given the greatest possible flexibility as to what is presented on that public service channel. It could include children's television educational/informational programs, political broadcasts, public affairs programming, public access, local C-SPAN-type fare, etc.

Again, I believe that the FCC, acting under the broad public interest standard, which is made explicitly applicable to the ATV operations in the 1996 Act, has the authority to adopt such an approach. It would of course engender a huge controversy, with the broadcast industry enlisting Congress to stop such a sweeping innovation. It is axiomatic that the more sweeping the change, the more the agency needs strong (even if divided) support from Congress and probably strong Executive Branch support. It is not at all clear that such support would be forthcoming. If this approach is not adopted initially, its imposition many years later would be most disruptive and thus foreclosed.

The foregoing assumes that the public service programming would be supported by advertising. This in turn would lead broadcasters to try to introduce more and more elements of entertainment into such programming to gain audience and thus advertising support (the "*Inside the NBA*" pattern encountered in the CTA core programming area, where a sports program such as *Inside the NBA* counts toward the children's educational television requirement). Disputes would inevitably arise as to whether the programming is really public service in nature—a natural consequence of behavioral regulation when it encounters the difficult, marginal cases.

One way to avoid all such disputes is to require that the public service channel be sustaining—that is, the public service element is supported by the advertising on the other four or five channels (like Channel 4 in the United Kingdom, supported for years by the advertising on Channel 3). Such a requirement would have the drawback that the licensee, with no revenue coming in and therefore no reason to attract audience to the public service channel (and thus away from the revenue-producing channels), would slough its responsibility by presenting low-quality, "cheapo" programming material. To deal with that problem, the FCC could follow the approach laid out in Section 303b(b)(2) of the CTA—the licensee could "buy" its way out of the entire public service obligation by paying the revenue represented by the 4 Mbs (easily ascertained by taking the average of the revenues of the other multiplex channels) to public broadcasting (locally or the national trust fund).

I have gone through the above analysis for two reasons. First, while it could still be argued that the FCC has the authority to act along the above lines under the public interest standard and its comprehensive rule-making powers to keep pace with this dynamic industry, the fact is that as a practical matter, a change of such sweeping nature could only be effected by the Congress. Second, the analysis shows that it is very poor policy if the broadcaster decides to "play" instead of "pay"—that this "play or pay" approach is really another variation on getting the broadcasters to pay. That being so, we are back to a spectrum fee model.

In the end, no broad reform action of the FCC, an administrative agency, can rise above Congress, the real arbiter of basic policy. If Congress is a failure, it is almost guaranteed that the FCC will also be a failure. So the basic issues and approaches must be brought before the Congress, with as cogent an analysis and reasons therefor as possible.

CONCLUSION

While there are many issues and nuances involved in the question of the public interest in the digital broadcast era, I believe that two relationships are of the greatest importance by far to the nation—broadcasting and education, and broadcasting and the political arena.

As for the first, education today is at the top of the public's concern, and while broadcasting is not a panacea, this medium, with its power and reach, can obviously make a significant contribution. In the digital era, there can, for example, be substantial educational multiplex operations that will make available a preschool (ready to learn) channel, a channel for the school-aged child, a literacy channel, an adult education channel, and a training channel especially for teachers and parents. For such an operation, it is sensible to look to public broadcasting, rather than the commercial sector. It is also sensible to go beyond the flawed CTA "play or pay" option (303b[b][2]) and directly impose a 1 percent "pay" solution (based on advertising revenues and station sales), leaving the commercial sector free to "play" as it wishes. (This is not to abandon the more optimum 2-percent solution discussed before, but rather to set out the bedrock minimum.)

In the second area, political broadcasts, broadcasting is the most powerful and sought-after medium, especially in national and state-wide races. Reform in this area involves many factors—political, pragmatic, constitutional—and, as noted, must be fashioned as part of an overall campaign-finance legislative package. But part of such a package—the political time bank, using a 1-percent solution (spectrum usage fee)—is again a bedrock measure.

Endnotes

1. See Angela Campbell's paper, "Toward a New Approach to Public Interest Regulation of Digital Broadcasting," in this volume.

2. The term "public broadcasting" includes not just over-the-air broadcasting but other telecom and related activities by public entities (e.g., satellites, cable, cassettes, the Internet).

3. I stress that this is a policy argument—not a constitutional one. The constitutional basis set out in *Red Lion* (*Red Lion Broadcasting Corp. v. FCC*, 395 U.S. 367 [1969]) is still applicable—the government licenses broadcasters; allocational scarcity exists in that more people want to broadcast than available frequencies can accommodate (which is still the case today); the government could have divided up the licensing time among many broadcasters (e.g., by week or month) but instead licenses one party who then is a fiduciary for all those kept off by the government. Significantly, *Red Lion* was a radio case when there were almost 7,000 radio stations; today there are over 11,000. It cannot seriously be argued that the scheme is constitutional at 7,000 but unconstitutional at 11,000. What *can* be cogently argued is that, as a matter of policy, a different scheme should be employed in television than in radio.

4 McCann-Erickson, 1997. The television broadcast industry overall earned about $37 billion in 1997, with $13 billion going to the four major networks. The $21 billion figure is used because the regulatory scheme is directed to licensees, not networks.

5 These figures include both "combo" sales (TV and radio) and radio only. The sums so obtained would go to the public broadcasting trust fund, and would be available generally to that fund; public radio would be funded from the 1 percent spectrum usage fee (see note 5).

6 In the case of radio, where the costs of operation are much lower than in television, the suggested percentage would be 1 percent of gross advertising revenues (roughly $12 billion in 1997; McCann-Erickson, 1997). The sums so obtained would be used for public radio and the political time bank, described in the following discussion.

7 Significantly, after examining rates negotiated in patent and copyright areas, the National Association of Broadcasters suggested that the Commission adopt a fee of 2 percent of gross revenues from ancillary advanced television (ATV) operations. Source: comments of the NAB filed 4 May 1998 in MM Docket No. 97-247, dealing with fees for ancillary use of the ATV spectrum.

8 This plan does not employ a spectrum usage fee to gain the necessary sums for the political time bank; rather, at the beginning of each election cycle, every TV and radio station would contribute two hours of prime spot time to a national time bank administered by the Federal Election Commission (FEC). The plan also places certain restrictions on use of the time (e.g., at least one minute at a time, with candidates on screen at all times). I suggested that the sums be allocated by the FEC to the national and state parties, to be used as they deem best. Clearly, these and other nuances of campaign reform are for the Congress—not the Advisory Committee—to decide, and therefore are not discussed further in this paper.

9 *FCC vs. Pacifica Foundation*, (438 U.S. 726 [1978]), affirming the FCC policy that indecent broadcasts can be lawfully channeled to late hours, did not rely on the public trustee/scarcity concept of *Red Lion*, but rather on the pervasive nature of broadcasting, with children present.

10 All subsequent references to individual sections of the law refer to the Communications Act of 1934, as amended, unless otherwise noted.

11 The rationale for the above suggested changes is make sure that the equal time regime does not interfere with broadcast journalistic efforts to inform the electorate. Long experience establishes application of the equal time standard to campaigns that include fringe party candidates (e.g., Socialist Labor, Vegetarian) simply results in no time at all; the major party or other significant candidates thus get no exposure, nor do the fringe party ones. Cf. *Arkansas Educ. Tel. Comm. v. Forbes*, 118 S.Ct. 1633 (1998).

12 For a more detailed discussion of the lowest unit rate provision in broadcasting, see the two papers by Anthony Corrado in this volume.

13 The Court unanimously held that cable is not subject to the provisions of *Red Lion*. See *Turner Broadcasting Sys., Inc. v. FCC*, 114 S.Ct. 2445, 2456–57 (1994). Significantly, cable does fit within the provisions of Section 315 (see 315(c)(1)) (defined by FCC rules to mean "origination cablecasting").

14 *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

15. *Quality Time? The Report of the Twentieth Century Fund Task Force on Public Television.* (New York: Twentieth Century Fund Press, 1993). See 35–39, on governance; 18–21, for local obligations.

16. At the same time, the NAB vigorously opposes all efforts to make the obligation effective, such as the three-hour guideline for core programming. Indeed, the NAB, in recent court filings and Hill testimony, has argued that *Red Lion* is no longer good law because scarcity no longer exists today. It is another indication of broadcaster "clout" that they can both argue for the social compact (the public trustee concept) and, at the same time, argue that the public trustee content scheme is unconstitutional—and yet no one in Congress calls them to account for this egregious conflict.

17. See Henry Geller, "1995–2005: Regulatory Reform for Principal Electronic Media," (Washington, D.C.: Annenberg Washington Program, 1994), 24.

18. That is often the length of the cable franchise. See, e.g., the fifteen year franchise for Media General in Fairfax, Va. (*Washington Post*, 12 May 1998, B1, 5). So again, symmetrical regulation of cable and TV would be promoted.

19. Prior to Congressional action in the 1996 Telecommunications Act, the FCC suggested a range that included the 50 percent figure for the TV national audience limit.

20. According to his spokesman, "Tauzin believes that once commercial broadcasters 'get a peek' at public interest obligations expected of them, they'll be more than happy to pay into a trust fund" (*Television Digest*, 18 May 1998, 6).

21. However, as noted, the spectrum fee model also includes a political time bank in connection with campaign finance reform.

22. See Tracy Westen, "A Proposal: Media Access for All Candidates and Ballot Measures," in this volume.

23. Without such a requirement, the candidates would accept the free time but still be driven to seek large sums to purchase additional broadcast time; as Senator McCain has stressed, in Barry Diller's apt phrase, it would be "pouring gasoline on a raging fire."

24. Geller, "1995–2005: Regulatory Reform for Principal Electronic Media," 31.

25. See Second Report and Order—Leased Commercial Access, 12 FCC R. 5267 (1997), aff'd, *Value Vision International, Inc. v. FCC*, case no. 97-1138, D.C. Cir., issued July 24, 1998.

26. See *Denver Area Educ. Consortium v. FCC*, 116 S.Ct. 2374 (1996).

27. *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957, 967–973 (D.C. Cir. 1996).

28. *Turner Broadcasting Sys., Inc. v. FCC*, *supra*, 114 S.Ct. at 2480 (O'Connor, J., dissenting); 819 F. Supp. at 61–62 (D.D.C. 1993) (Williams, J. dissenting).

29. The suggestion that equal opportunities apply to ballot issues would be beyond the FCC's authority, and in any event does not deal with the real issue—the need for free time to correct any large imbalance in the treatment of a ballot issue.

30 The FCC had such processing guidelines until the deregulation actions in the 1980s. See *UCC v. FCC*, 707 F.2d 1413, 1420–21 (D.C. Cir. 1983); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 854–55 (D.C. Cir. 1970); but see *National Black Media Coalition v. FCC*, 589 F.2d 598 (D.C. Cir. 1978).

31 Indeed, as to radio broadcasting, it does not fit the situation today, with the many specialized programming formats in the major markets. See, e.g., the 1976 example of the classical music station, KIBE-AM, where the licensee, in order to meet the FCC processing guideline of 8 percent nonentertainment, dropped a 6 a.m. baroque music program for a talk show.

32 See, e.g., *Red Lion*, 395 U.S. at 379–80, and *NBC v. U.S.*, 319 U.S. 190 (1943). When Congress wants to restrict the agency as to content regulation, it knows how to do so. See Sec. 624 (f)(1), restricting FCC content action in the cable field.

33 Acknowledgment: I prepared the Common Cause filing.

34 Another pending proposal in which I also participated is a rule-making request that LUR be afforded only when the candidate appears in the spot at least 30 percent of the time. This is less controversial than the above free time matter, but there has been no FCC action on it for the last two years. Standing alone, it is probably not of sufficient importance to warrant consideration by the Advisory Committee.

Casting a Broader Net: The Obligations of "Digital Broadcasters" in a Changing Media Environment

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INTRODUCTION

The President's Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters has been asked to advise the nation on the obligations the next generation of broadcasters owes to the American people. Or has it? By its mandate, the Committee is concerned specifically with the obligations of licensed, over-the-air digital television broadcasters,[1] but in the years to come these will hardly be the only entities "broadcasting" content to the public, by which I mean distributing it widely on a subscription, pay-per-view, or free basis. Indeed, Americans can already receive video programming via cable networks, direct satellite, and the Internet, and the range of distribution channels is likely to continue expanding as new technologies become available.

The members of the Committee and other policymakers should therefore take into account the full landscape of content-delivery options and the implications of this range of choices for the public interest—including the desirability, and feasibility, of imposing obligations on some broadcasters and not others. Within such a holistic view, policymakers should particularly consider the public interest attributes of the Internet—because this medium may well subsume other broadcast media—including the possibility of establishing for the new media environment an incentive-based scheme to bring attention to public interest programming that is likely to be available but also likely to be obscured by commercial content.

REGULATION AND THE CHANGING MEDIA ENVIRONMENT

A decade and a half ago, MIT media scholar Ithiel de Sola Pool argued that governments should apply the same laissez-faire approach to electronic media that they apply to print media.[2] Regulation of electronic media was unnecessary, de Sola Pool wrote, because a revolution in technology would both eliminate spectrum scarcity and lower barriers to entry for anyone who wished to disseminate his or her views widely. The result, he said, would be a vibrant and open information marketplace in which data, voice, and video would be carried cheaply and universally over high-speed interactive communications networks. Today, many scholars and observers believe we are achieving, or even have achieved, the media environment that de Sola Pool predicted. They therefore see little reason for government to regulate electronic media. Other observers agree that the technological changes predicted by de Sola Pool are coming to fruition, but still see a need for public interest regulation.

Such regulation does, of course, still exist for all sorts of broadcasters. Licensed analog and digital over-the-air broadcasters are still required to operate "in the public interest, convenience, and necessity"—serving local needs, making time available to political candidates, providing children's programming, and so on.[3] As a condition of their municipal franchises, cable television operators can be required to rebroadcast local over-the-air television programming, to provide leased access to commercial competitors, and to carry public, educational, and governmental programming.[4] Similar obligations apply to direct-broadcast satellite providers.

But one distribution method does not carry public interest obligations: the Internet. In part, this is because the Internet is still in its infancy and the response of the federal government—the Communications Decency Act aside—has generally been not to regulate it. In addition, however, the Internet has features that distinguish it from other forms of broadcasting and make the imposition of public interest obligations uniquely problematic. To begin with, the Internet is a multifaceted medium. Like the telephone, it allows for targeted one-to-one communication (e.g., e-mail). But it also allows for one-to-many communication (via listservs or the Web) that may have an audience of hundreds, thousands, or millions of people. This flexible structure raises a definitional question: What is a "broadcaster"? That is, how broadly does one need to distribute material in order to be considered a broadcaster for regulatory (or other) purposes? Even if this question can be answered, the fact that the Internet is a transnational medium may well make it difficult—if not impossible—for any single nation to impose obligations on Internet broadcasters.

The absence of public interest obligations for Internet-based content providers is particularly significant for two reasons. First, inconsistent regulatory rules for different types of broadcast might cause more heavily regulated broadcasters to balk at their own obligations and to engage in "regulatory arbitrage" (shifting their content distribution to the least regulated environment). Second, and perhaps more important, continuing bandwidth expansions and improvements in audio and video transmission quality provide reason to believe that the Internet's packet-based protocol of information transfer will come to dominate electronic media. In other words, over-the-air, cable, and satellite broadcasting may well become indistinguishable parts of a larger network still known as the Internet. Such a convergence scenario raises profound questions about the regulatory regime that will prevail. If a broadcaster uses licensed, over-the-air spectrum to distribute digital packets of streaming video data, will such distribution be covered by the Committee's proposed obligations for digital broadcasters? If a cable operator uses coaxial cable lines to transmit packets of video data (a practice that is already occurring in many parts of the country), will such transmission be covered by public interest rules that apply to cable operators? How will regulators distinguish packets of video data from packets of audio or text data? And will it matter whether the material is "pulled" to the screen by the viewer or "pushed" in the style of traditional television programming?

These queries naturally point to the larger question of whether public interest obligations should apply at all to future Internet broadcasters and, if so, what they should look like. To begin to address this question, we should take a brief detour to consider the relationship today between the Internet and the public interest.

THE INTERNET AND THE PUBLIC INTEREST

The Internet appears in many ways to be a public interest advocate's fantasy. As a result of this technology and its future progeny, we are likely to find a media environment that contains:

- more material generated for its own sake by individuals, nonprofits, and small companies;
- far-ranging coverage of news and public affairs;
- vibrant and plentiful programming for children;
- affordable access for political candidates;
- uninhibited artistic expression;
- meaningful representation of the diverse interests of communities, and;
- unencumbered opportunities for individuals to be content producers.

In short, the decentralized, interactive, many-to-many architecture of the Internet could have a radically egalitarian effect on the information marketplace. Such an effect is different from the increase in information sources associated with, say, cable television. If there is one area where cyberspace evangelists are right, it's that the Internet could change the power dynamics of media and communications. This technology allows individuals to control what they read, listen to, and watch, and to release an unprecedented wave of vibrant public discourse and creativity. Unconstrained by the scarcity of the airwaves or the costs of large-scale print publishing, anyone online can get the word out—via text, audio, or video.

Already, the diversity of cyberspace is a bracing alternative to the conformity of mass media. Web 'zines and e-mail newsletters are ubiquitous (there are more than a hundred thousand of the latter). Artists are showing their work in virtual galleries. Musicians are uploading their compositions for others to hear. As bandwidth expands and technologies improve, Internet auteurs might even go head-to-head with the media conglomerates of the world—creating an open market for cheap video distribution. Activists, too, have turned to the Web to spread their views, garner support, and coordinate action. They've done so not just to fight for cyber rights (e.g., free speech and privacy online) but also for the environment, human rights, and political reform. In December 1996, when Slobodan Milosevic shut down Belgrade's Radio B92, an important pro-democracy protest station, the station fed its programming to the Internet and won enough support internationally to force Milosevic to reverse course.

That the Internet has such great democratic potential does not mean that public interest concerns can be brushed aside. But the areas of greatest need may not be obvious. One fear is that the Internet is still an exclusive medium, disproportionately accessible to those who are educated and wealthy. This, in fact, is why the Clinton administration has initiated the "e-rate" plan to subsidize Internet wiring and access for schools and libraries in disadvantaged areas. Real as the inequality-of-access problem may be today, though, it will diminish in importance as public institutions come online, as computer prices continue to fall, and particularly as the Internet and digital television become integrated in the decade to come (TV-based Internet appliances are already available for a few hundred dollars). Other inequalities relative to technology will remain—for example, as digital literacy and economic well-being become intertwined—but the ability to afford an Internet connection will probably not be one of them.

Rather than focusing solely on disparate access, then, public interest advocates should turn their long-term attention to the online experience itself. Opposition to state censorship should continue, whether the restrictions are imposed by China and Singapore, by the U.S. Congress, or by libraries in Loudoun County, Virginia. Increasingly, though, it should be clear that governments are not the only entities that can stifle the spirited din of cyberspace. Indeed, while China may censor what its citizens see online, a handful of technology companies have the ability to alter the very architecture of the Internet, affecting what all of us see.

This is already occurring. Microsoft, for example, uses its dominance of personal computer operating systems to influence what people encounter on the Web. The company capitalizes brilliantly on what might be called the "path of least resistance" theory of media domination: As a powerful gatekeeper, Microsoft doesn't need to restrict the choices of its users, because it can simply steer them—subtly but strongly—where it wants them to go. So, for example, Microsoft's Windows 98 has features that lead users directly to Microsoft's own content and commerce sites on the Web as well as to those of its partners such as Disney and Time Warner. This would appear, as the Justice Department's current antitrust suit against Microsoft alleges, to be a classic case of a dominant access provider giving preferential treatment to its own content and discriminating against the content of others. Even de Sola Pool, the champion of laissez-faire communications policy, insisted that the "monopolist of the conduit not have control over content."[8]

FROM SPECTRUM SCARCITY TO SCARCITY OF ATTENTION

Whatever one thinks of the Microsoft case, the increasingly intense battle for viewers' attention online should help public interest advocates realize that their focus must change as the communications landscape changes. In the era of television (including cable and direct-broadcast satellite), lawmakers have used the scarcity of the medium as a justification to require broadcasters to save a place on the dial for local access, educational shows, and other nonprofit programming. Will the absence of spectrum scarcity eliminate the need for such public interest regulation? To be sure, the rationale for imposing obligations must be different in a post-television world where "channels" are essentially unlimited and almost anyone will be able to speak. But there may be such a rationale.[9]

Indeed, we may realize that the problem with our new media environment is not scarcity of space but its opposite: an abundance of space—and content—that creates scarcity of attention. In other words, the good stuff will be out there, but with so many competing information sources it will be difficult for people to know about it, let alone listen to it.

Public-access cable TV programmers have long known the frustration of being relegated to channel 87 while the big networks occupy the expensive real estate at the lower end of the dial. But with television, there's at least a chance that a channel-surfing viewer will catch a glimpse of non-commercial programming and stay—if it's worth staying for. Online, by contrast, marginal voices can literally be lost in cyberspace. Since content is not arranged sequentially, there is almost no chance that a viewer will come upon a small Web site unintentionally (i.e., while trying to get somewhere else). Search engines, default start pages, and other entry portals to cyberspace are therefore of great importance.

Yet as these gatekeepers recognize what a valuable commodity attention is, they are increasingly turning the Internet-as-sprawling-library into the Web-as-never-ending-billboard. Some search engines, like Goto.com and OpenText, have tried to auction search results to the highest bidder. Most of the other search engines simply place search results amid targeted ads that track the user's search. Search for "bookstore," for example, and a prominent paid link to Amazon.com or Barnes & Noble—a so-called banner ad—will appear sooner than a link to the Web site of any small bookstore. In all these situations, the big players are paying for the path of least resistance. Everything else gets jumbled in the mix.

The significance of this is clear. In the broadcast paradigm of the future, high-quality public interest content will be available, but only to those who are most determined to find it. This is unfortunate, first, because those who stumble accidentally upon this material probably benefit from it as much or more than those who seek it out. And second, this dynamic may undermine the presumption that the Internet is fundamentally different than other electronic media. As with television and radio, it seems likely that commercial content online will thoroughly dominate noncommercial content.

INCENTIVIZING THE SHARING OF ATTENTION

In a sense, public interest regulation of broadcasting has always been about requiring commercial providers to share attention with noncommercial providers. In the context of the Internet, do these concerns about attention—or the possibilities mentioned earlier of regulatory arbitrage and convergence—mean that obligations should also be imposed on Internet broadcasters? It is probably too early to tell. But it is fair to say that these questions will have to be resolved soon and creatively. The old regulatory strategy of mandating public access probably will not work in a world without channel scarcity. To find an audience for public interest programming, then, advocates are going to have to try novel solutions.

One strategy that might work in the Internet context would be to create an incentive scheme to get large for-profit content providers to share the audience they are able to command with small nonprofit sites that deserve attention but don't have the resources to get it. The incentive could be provided by government in the way of a tax break or subsidy. Or if implemented by industry (perhaps with prompting from consumer groups), the incentive might just be good public relations. In fact, it might be better if the incentive were not supplied by government, as this would decrease the likelihood and viability of any constitutional objections.

Technologically, the Internet is ideally suited to such incentive-based partnerships because of the essentially unlimited nature of the medium and the fact that the Web works on a system of hyperlinks. Microsoft, for example, could reserve space on the front page of its Sidewalk city-based Web sites for links to the home pages of nonprofit community groups and media organizations.[10] Presumably, whatever reward it received through the incentive system would be proportionate to the amount of traffic it generated for the nonprofit site. That way it would have a real stake in sharing attention. Among the details that such an incentive scheme would have to resolve are: which sites would be eligible "sharers" of attention, which sites would be qualified "sharees," who would determine which sharers and sharees would be partnered, how prominent a link would be required, and so on.

More ambitious schemes certainly are plausible. Following a "pay or play" model, online gatekeepers could be taxed in proportion to their traffic or required by law to carry, or link to, nonprofit content. Or, in a manner somewhat comparable to National Public Radio or PBS, the government could fund a digital gateway focusing on public interest content or it could subsidize production of such content (though again, the question might be how to attract people's attention). By contrast, encouraging linkage between profit-oriented and nonprofit content producers is a limited goal. It would cost taxpayers little or nothing, and it would not interfere with the structure of the Internet or the rights of its content providers. It would also continue the tradition of having dominant media entities act as trustees for the public interest.[11]

CONCLUSION

Whether or not an incentive system or some other form of public interest commitment is ultimately appropriate for the Internet, one matter should be clear. Unless policymakers in the area of digital broadcasting consider the most expansive view of the media environment, the rules they recommend today may have unpredictable consequences tomorrow, if they are consequential at all.

Endnotes

© Andrew L. Shapiro, 1998. Portions of this paper were adapted from Andrew L. Shapiro, "New Voices in Cyberspace," *The Nation*, 8 June 1998.

1 President Bill Clinton's executive order does not specifically mention "over-the-air" digital television broadcasters. See Executive Order 13038, 11 March 1997 (establishing "an advisory committee on the public interest obligations of digital television broadcasters"), available online at http://www.pub.whitehouse.gov/uri-res/I2R?urn:pdi://oma.eop.gov.us/1997/3/11/10.text.2. But the Department of Commerce's charter for the Advisory Committee states that "[t]he Committee will study and recommend what public interest responsibilities should accompany the broadcasters' receipt of digital television licenses." See Charter of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, available online at http://www.ntia.doc.gov/pubintadvcom/about/charter.htm.

2 Ithiel de Sola Pool, *Technologies of Freedom* (Cambridge: Harvard University Press, 1983).

3 47 U.S.C., sec. 336(d).

4 Sec. 531–534, 541. See *Turner Broadcasting System v. FCC*, 520 U.S. 180 (1997), which upholds "must carry" provisions for cable providers.

5 The Federal Communications Commission has acknowledged that "[d]ifficult legal and policy issues arise from the fact that Internet-based services do not fit easily into the longstanding classifications for communications services under federal law or FCC regulations." Barbara Esbin, "Internet Over Cable: Defining the Future in Terms of the Past," Federal Communications Commission Office of Plans and Policy Working Paper No. 30 (August 1998), p. 1.

6 Chris Hedges, "Serbs' Answer to Oppression: Their Web Site," *New York Times*, 8 December 1996, A1.

7 Restrictions on Web access in Loudoun County's libraries have recently been challenged in a court case that is likely to succeed. See "Trial Allowed on Challenge to Software," New York Times, 9 April 1998, A19.

8 de Sola Pool, *Technologies of Freedom*, 173.

9 See paper by Angela Campbell, "Toward a New Approach to Public Interest Regulation of Digital Broadcasting," in this volume.

10 Upon reading an earlier version of this paper, David R. Johnson made the following innovative suggestion: "Create electronic 'tours' of good public interest, low-visibility sites and seek to persuade the major portals to include a 'trailhead' tour button on their top pages."

11 There are, of course, a host of other "public interest" issues related to the Internet that are beyond the scope of this essay. These include: protecting the privacy of personal information; securing communications while recognizing law enforcement's legitimate need to access certain information; examining the impact of the Internet on social cohesion and geographically based community building; monitoring the effect of disintermediation on the regulatory process, particularly the ability of states and municipalities to collect their fair share of tax revenue as cross-border electronic commerce grows; maintaining an equitable balance between the interests of intellectual property owners and information users; preventing the wholesale privatization of public data; and so on.

PART III:

POLITICAL BROADCASTING

Enhancing Political Discourse: Proposals for Political Programming in the Digital Era

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The Aspen Institute, with funding from The John and Mary R. Markle Foundation, hosted a conference on March 30 and April 1, 1998, to discuss methods of enhancing political discourse in America and to consider the public interest obligations of digital broadcasters with respect to political programming. The conference brought together two dozen experts with a variety of backgrounds and perspectives, including legal scholars, political scientists, attorneys versed in telecommunications law, public interest advocates, and individuals with experience in the broadcast industry. It is hoped that the ideas generated by this group will be useful to policymakers and others involved in the ongoing debate over broadcasting and the public interest.

The purpose of the conference was to examine whether further regulation will be needed to ensure that citizens will have appropriate access to political information as we enter the era of digital broadcasting. Conference participants discussed the efficacy of current political programming regulations, the prospects for political programming in a digital media environment, and the advantages and disadvantages of a range of possible regulatory alternatives. The central issue that framed these discussions was the question of how to best fulfill the public interest in political programming without imposing unreasonable burdens on broadcasters and political speakers, especially candidates seeking elective office.

OVERVIEW

The broadcast media are the predominant means by which candidates, especially those seeking federal or statewide office, communicate their views to the electorate. This will continue to be the case with the rise of digital television and other forms of digital communication. Candidates, political parties, and major organized groups will continue to seek access to broadcast media in an effort to share their views with both the public at large and targeted constituencies.

While there may eventually be a number of means available for reaching sizable audiences (including a number of Internet-based systems), broadcast media will continue to be the principal vehicle used by those competing for our nation's highest offices. Broadcasters will command the largest audiences; candidates will be most familiar with broadcast advertising and in all likelihood will continue to need the type of unfiltered speech that this medium allows; and broadcast advertising will continue to be an efficient means of gaining access to those viewers who are not consumers of news or political programming.

There will therefore be an ongoing need to ensure political candidates' reasonable access to broadcast media. But how this access will be achieved, and the implications it will have for broadcasters, must be carefully considered. Because digital broadcast technology is so new, substantial uncertainty exists as to how it will be used and how it will develop in the future. Broadcasters will continue to work to meet the needs of the public as best they can. Yet, to do so, they will need flexibility to respond to emerging practices, shifting consumer preferences, technological advancements, and competition from within and without the broadcast industry. They will also need to continue to maintain the broadest possible discretion and editorial freedom in determining the content and format of their programming. To the extent they are subject to regulation, they should be free of burdensome requirements or unreasonable costs.

But it is important to keep in mind that future broadcast programming will take place in a new information environment for political communication. Although broadcast media will anchor the political information offerings available to the public, the role of media is likely to be redefined, with much greater interplay among media vehicles; broadcasters will use Internet-based systems, for example, to supplement or advertise political media options and events. In such an information environment, broadcasters must be encouraged to serve the public interest through political programming and advertising, not just by offering access to high-quality information on Internet sites.

A certain amount of flexibility is also needed if we are to develop new, effective, and diversified means of providing the citizenry with interesting, useful, and responsible information and messages about political issues and candidates (which all of the conference participants considered to be the basic need that might be served by new technology). Digital technology offers an array of possibilities for promoting public interest education and information. Internet-based communications and web sites, broadcast programs, electronic bulletin boards, CD-ROMs, videocassettes, and broadcast advertising are all methods of delivering information and messages that are likely to become more accessible in the future. The potential synergies that might take place among these methods or the extent to which they might be incorporated into a digital broadcast network should not be overlooked. Whether the potential of these new technologies will be realized depends on market forces and the regulations to be developed for digital broadcasting. While broadcast advertising is likely to be the dominant mode of political communication in the near future, any regulatory approach should be open to other forms of communication, and should avoid the creation of incentives that will encourage candidates and other political speakers to favor the purchase of broadcast advertising time over other viable alternatives that may develop.

This last point is particularly important given the concerns that already exist about the role of television spot advertising in political campaigns and the effect of such advertising on the costs of campaigns. The rise of television and radio advertising as the principal means by which candidates share their views with the electorate has had a substantial effect on the character of political campaigns. The costs of advertising have been the major factor in rising campaign costs, and the need to purchase broadcast time and the desire to outspend an opponent on television have stimulated the frenzied money chases that have become a defining characteristic of recent elections. As a result of these growing financial demands, candidates are spending more and more time raising money. And the result is a political discourse that consists largely of competing thirty-second ads, which do little to stimulate civic participation or elevate voters' understanding of the major policy issues currently facing the nation.

In thinking about how the public interest might best be served in the digital era, it is also important to keep in mind the different speakers or types of political communication that will be seeking access to the air waves and may be affected by regulatory decisions. Which speakers should be ensured opportunities for access to the digital air waves, and the extent of those opportunities, are a matter of debate. As many conference participants noted, a variety of political speakers and programming formats exist that could give voters access to information or that could be encompassed in a system of political broadcast regulation. These include:

- **Candidate advertising**. Current regulations ensure opportunities for access to federal candidates who want to advertise over the air waves. But candidates seeking access to broadcast media include not only contenders for federal offices, but also a significant number of those seeking office at the state or local level, especially statewide candidates and city officials in major urban areas. This pool of candidates can be further differentiated by distinguishing between major party candidates and non-major party candidates (independents, significant minor party challengers, and fringe party candidates). As for the access they seek, it can be in the form of either paid time or free time.
- **Issue advocacy**. Candidates are not the only speakers that use the air waves to educate the citizenry about issues or to persuade individuals to cast their votes in particular ways. The growing number of ballot initiatives and referenda campaigns has spurred a notable rise in the demand for advertising time on the part of interest groups and corporate entities, which seek access to the air waves to influence voters' opinions on these issues. In addition, party committees and interest groups are engaging in an unprecedented amount of advertising to promote their legislative agendas and positions on selected policy issues. While this activity has increased the amount of information available to the electorate, it has raised the question of whether the public is gaining adequate exposure to

diverse viewpoints. It has also led to a concern that the growing demand for time may be reducing the opportunities for access available to candidates.

- **Political programming.** The public receives a substantial share of its political information in a mediated way from news broadcasts or political programming developed by broadcasters or other sponsors. This category of programs encompasses news coverage (including candidate debates) exempt from equal time regulations under current law as well as public affairs programming subject to equal time regulations. This component of political broadcasting has grown dramatically over the past decade as the number of news magazines, talk shows, and other types of public affairs programming has expanded. Although these programs usually do not offer candidates opportunities for unmediated communication, they provide candidates and issue advocates with additional access to the electorate, and are an essential means of creating an informed public.

BASIC PRINCIPLES AND OBJECTIVES

In thinking about these various kinds of political communication and the public interest to be served by digital broadcasters, participants identified a number of principles or goals that should be the foundation of any future regulatory approach. In general, there was a broad consensus that the system should offer ample opportunities for candidate access and provide broadcasters with incentives to air political programming in order to foster a well-informed and active citizenry. More specifically, participants advanced five objectives as the foundations of their deliberations:

- **Ensure free and fair elections.** Democratic government is based on a system of free and fair elections. Broadcast regulation should promote the freedom and fairness of the electoral process by providing safeguards against corruption and allowing the air waves to be used freely and fairly.

- **Reduce barriers for high-quality candidates.** Competition in elections strengthens our democracy by improving the alternatives available to voters and stimulating public interest and participation in the process. Competitive elections should be encouraged by avoiding unreasonable barriers to entry for high-quality candidates and by creating opportunities for access that do not unfairly advantage particular candidates.

- **Promote an informed citizenry.** An informed electorate is essential to the vitality of our political system. Citizens should have ample access to information so that they may make informed decisions and keep abreast of major policy debates. The most effective means of delivering information to the public would incorporate both broadcast and narrowcast approaches. It would also allow individuals to self-select information they are seeking (i.e., "pull" information they desire), while exposing audiences to information that they might not otherwise seek (i.e., "push" information to them), which may, in turn, stimulate greater political interest.

- **Enhance the quality of political discourse without creating First Amendment tensions.** The public interest is best served by a regulatory approach that encourages full and robust debate, and enhances the quality of political discourse in our society. But any effort to improve the level or quality of discourse must be pursued in a way that affirms the First Amendment liberties of citizens, candidates, and broadcasters. Candidates should be allowed to express their views freely, with no censorship of the messages for which they are responsible and without burdensome regulatory requirements dictating the manner and content of their speech. Broadcasters should be given incentives to serve the public interest, but any regulations should ensure that broadcasters have flexibility and discretion in programming decisions.

- **Stimulate civic participation.** Increasing the flow of information does not necessarily result in an increase in citizen participation. To the extent possible, future regulatory approaches should try to foster civic participation by not only expanding the opportunities available to the public to receive information, but also by exploring methods of engaging the public and using digital technologies to provide citizens with opportunities to participate in political discourse.

Conference participants noted that these goals are often interrelated and involve tradeoffs that must be kept in mind when considering different regulatory approaches. For example, increasing broadcasters' flexibility and discretion in programming may not guarantee candidates the access they want to broadcast their own messages. Expanding candidates' opportunities for access may simply result in the airing of more thirty-second spot advertisements, which may do little to improve the quality of political discourse. But efforts to improve discourse may lead to burdensome requirements that create First Amendment tensions, or result in programming that fails to engage the public and expose large segments of the audience to political information. Even if the quality of political information is improved, there is no guarantee that the result will be an increase in civic participation. Any regulations adopted for digital broadcasting must therefore attempt to strike a balance among the possibly competing interests that constitute the public interest in this area.

THE DIGITAL ENVIRONMENT AND THE PUBLIC INTEREST

Working Assumptions

In considering whether regulation would be needed to ensure the public interest in digital broadcasting, conference participants identified a number of working assumptions about the potential effects on political programming that are likely to accompany the shift to digital broadcasting. To begin, the participants predicted that the substantial amount of time spent viewing television in each home will not increase significantly. The average of about 7.4 hours per day has not grown significantly since 1984. The major change will therefore be further segmentation of the audience; as the number of channels and program offerings expand, the viewing audience will be further divided among the available alternatives.

The findings of a Harris survey presented at the January meeting of the President's Advisory Committee revealed that almost all stations plan to utilize the digital channel to transmit high-definition television and data during prime time and standard-definition programs and data during the rest of day and late evening.[1] (It is important to note, however, that this finding should not be taken as conclusive, since many experts disagree with the assertion, believing instead that there will be less prime-time high-definition broadcasting than this survey suggests.) During other than prime-time hours, stations will air up to five standard-definition programs, thus dramatically expanding the program offerings available to viewers. It is expected that many of these programs will capture relatively small shares of viewers and therefore generate relatively low revenues. Larger audiences are expected for prime-time, high-definition programming, which will cause these programs to become particularly important sources of revenue of broadcasters.

The move to digital broadcasting will thus further intensify a competition for viewers that is already more heated than ever before. The public will have access to more choices of channels, more program alternatives, and enhanced broadcast capabilities. In such an environment, broadcasters will have strong incentives to offer viewers the programming they desire and pursue innovations in programming that will capture viewers' attention.

One consequence of this substantially greater competition for viewers' attention is the likelihood of smaller audience shares for the major networks. Over the past decade, audience shares held by the major networks declined, in large part due to the rising competition from cable television and satellite broadcasting. While the major networks' shares have been relatively stable in the past few years, they are still going down. Although there is no way to determine if their shares will decline significantly with the advent of digital television, a further decline is expected, although the major networks will continue to command the largest audiences.

Another consequence is that more channels will be available for use by candidates or other political speakers, and thus there is the potential for more opportunities for access to the air waves. More advertising slots will certainly become available, as stations build inventories for multiple program slots. While there is presently no way to know what type of programming the public will demand, it is likely that there will be more news programming and news magazines, since most local stations build programming around local news broadcasts, and news magazines tend to be less expensive than original entertainment programming. Some conference participants noted, however, that this outcome will depend on public demand; if these programs do not attract acceptable levels of viewership, they are likely to be replaced by some other type of program. Further, more news programming will not necessarily mean more political news. The recent growth in the number of news magazine programs, for example, has not resulted in more political material being made available to citizens, especially if legal conflicts are excluded.

Participants further agreed that candidates, political parties, interest groups, and other political speakers will continue to seek time to air advertising spots, even though other opportunities for access and other methods of communication will increasingly be available. Most importantly, candidates will continue to need advertising time that provides access to a wide array of audiences. While those seeking elective office will value the exposure provided by public affairs channels or self-selected audiences such as those who watch public television, CNN, or MSNBC, to name a few current examples, there will be a broader desire for access to the "attention economy" represented by viewers of non-news or non-political programming.

Candidates need to reach those segments of the audience that they believe will be receptive to their messages or open to persuasion. They need to be able to "push" their messages on viewers who are not consumers of public affairs programming or who represent particular demographic targets of their campaigns. In other words, they will have to have some ability to distribute their messages to those viewers who might not specifically be seeking political information. They will also need access to prime time in an effort to reach as broad an audience as possible, and those viewers who only watch television during these hours or only listen to radio during drive time and other peak audience periods. Accordingly, candidates' demands for access will not be satisfied simply by providing an isolated space on the spectrum dedicated to public affairs programming or by requiring access on specific stations. While these approaches may be important methods of further informing the public or of enhancing the quality of political programming, they are unlikely to satisfy candidates' needs for broadcast time.

Regulatory Issues

Given the changes expected to accompany the advent of digital broadcasting, the fundamental issue the conference addressed was that of whether any regulation at all was needed to serve the public interest in political programming. Will the digital era give rise to a new era of abundance in which candidates and other political speakers have ample opportunities to broadcast their messages to the electorate? Will it be easier for candidates and other speakers to broadcast their messages? Will it reduce the financial pressures candidates currently face in purchasing broadcast time? Will broadcasters have adequate incentives to produce the type of high-quality political programming that will enhance the information available to the electorate?

Participants noted that the capacity to multicast a number of channels, and transmit data as well as programs, will substantially expand the opportunities available to candidates and others to distribute political information through broadcast vehicles. The greater number of channels and variety of programming that will be available will make it easier for candidates to broadcast to targeted audiences as well as design messages for particular demographic subgroups within the electorate. And it will provide broadcasters with a capacity to schedule additional news and public affairs programming, which will create substantial opportunities for additional coverage of politics and government.

These possibilities led a number of participants to suggest that many current regulations may no longer be needed in the digital age. While no participants advocated a wholly unregulated arena for the broadcast industry (i.e., a truly free market), some noted that a more "free-market" or "deregulated" approach merits consideration. By this they meant an approach that continues some regulation, most importantly the disclosure requirements of sponsorship identification, but simplifies or eliminates other current regulatory provisions, such as the Equal Time Doctrine or the lowest unit rate requirement. Such an approach would free broadcasters from burdensome administrative requirements, reduce the complications involved in enforcing current law, and still offer access to the air waves to candidates, parties, interest groups, and other speakers on an equal basis. Many conference participants, however, had reservations about this approach, raising questions of accountability, candidate access, issue debates, and the quality of political discourse.

Accountability

Most participants questioned whether such a free market or deregulated approach to political programming would promote the goals considered to be essential to the public interest for digital broadcasting. First, as one participant noted, regardless of the opportunities for access that may arise with digital broadcasting, there will still be a need to ensure that the system is free of corruption and that the public is receiving accurate information about the sponsors of the messages being broadcast. Regulations comparable to those under current law that require that each political broadcast ad to disclose the ad's sponsor and that require stations to ensure that the real sponsor of an ad is identified (where they know or by reasonable diligence learn the identity of the true sponsor) should be maintained.[2] Such regulations help to promote the accountability of the system and foster the public's right to know who is attempting to persuade them through broadcast messages.

Candidate Access

Several participants questioned whether candidates would have the access they need to purchase broadcast time in an unregulated environment. Current law guarantees federal candidates access to the air waves and allows these candidates to purchase time at the lowest unit rate for spots aired in proximity to an election. Participants noted that these requirements have played a significant role in ensuring candidates' access. But several also noted that the lowest unit rate requirement has been particularly burdensome to broadcasters and proven to be difficult to enforce.

Nonetheless, even these regulations have not been as effective as some participants would like. There have been a number of reported examples where stations have not provided federal candidates with the access they sought, preferring instead to favor major advertisers or advertisers willing to pay premium rates. Similar situations have occurred in nonfederal races, where there is no requirement to offer candidates opportunities to purchase advertising. Participants also raised the problems encountered at some smaller stations, where a particular candidate (especially in nonfederal races where candidates do not enjoy the same access protections as their federal counterparts) may be given preferential access or, conversely, relatively little opportunity to use the air waves.

While lowest unit rate provisions have produced cost savings for candidates, some participants observed that changes in the ways broadcasters sell advertising have diminished the efficacy of the lowest unit rate provision, resulting in higher costs to candidates, especially those who seek guaranteed time in particular program slots. The growth in advertising generally, and the increased competition for time during election periods that results from the desire of other political speakers to purchase time, often serves to increase rates in ways that further increase the costs incurred by candidates.

A major concern raised at the conference was that these problems may be exacerbated in a digital broadcast system. Digital broadcasters are likely to face higher revenue demands due to the combination of station conversion costs, the additional costs of programming, and smaller audience shares due to segmentation of the market. In such an environment, broadcasters may have a greater incentive to grant preference to major commercial advertisers, long-term accounts, and those willing to pay a premium for particular time slots. Others noted, however, that there will be a much greater supply of available advertising slots, which will make it easier for broadcasters to satisfy candidate demand. In addition, broadcasters will have an incentive to sell time to candidates, especially as they try to fill the time available for purchase during the multicast portions of the day. The problem, as one participant noted, will therefore be a problem of each station's inventory control of advertising slots, which can be managed without stringent regulatory requirements. Others, however, felt that the experience under the current system suggests that there will be a strong incentive to favor non-political advertising.

These concerns raise the issue of whether access to broadcast time will become an even greater barrier to entry for some candidates, thereby diminishing the quality of competition in elections and limiting the type of full and robust debate that encourages a wide range of discourse and thereby improves voters' knowledge of the issues. Several participants expressed a concern about the ability of challengers, or other candidates without access to significant financial resources, to gain access to the air waves in a meaningful way. While the presidential race, major federal races, and some statewide contests receive significant amounts of news coverage in some markets, this is not universally the case. In fact, many markets provide less and less coverage of candidates, elections, and issues. Many candidates therefore have to rely on paid advertising to communicate their views to the electorate. If candidates have to compete in a "free market" for advertising time, the competition with commercial advertisers or well-financed party committees or political groups may result in their having to pay even higher prices, which may in turn make it financially difficult, if not impossible, for many candidates to reach a mass audience.

Even if candidates are able to get access to paid advertising time, several participants noted that this does not ensure that they will have access to the most important time: prime time. Given the anticipated segmentation of the market, and if most stations do primarily broadcast high definition programming during prime time, this period is likely to be highly prized by advertisers. Prime-time, high-definition programs are likely to garner the largest audiences, with viewerships significantly larger than those of the multicast programming aired during other parts of the day. In an environment of increased market segmentation, they are also likely to attract the broadest audiences with the most diverse demographics. For this reason, prime-time slots may be even more desirable for major commercial advertisers in a digital era than in the current broadcast environment, since these slots will offer the only opportunities to reach a truly mass audience. They might also offer the best opportunities for accessing the "attention economy," the best opportunities to push information to those people advertisers (and candidates) would want to reach. Accordingly, major advertisers are likely to pay a significant premium for prime time. Broadcasters will therefore have an incentive to give preference to commercial advertisers, and, even if federal candidates do enjoy some right to purchase advertising slots in prime time, the competition for prime-time slots may price all but the wealthiest campaigns out of this crucial time period.

Issues Debate

Participants' concerns about access and the need to foster robust debate extended to the discussion of policy issues. A number of participants noted that current federal regulations regarding equal access do not apply to advertising by groups or organizations that attempt to influence voter opinion on ballot initiatives or referenda, or to ads that seek to inform the public about policy issues. Consequently, there is no obligation on the part of broadcasters to provide equal time to different viewpoints in a referenda campaign. Nor are stations required to air ads sponsored by groups advocating particular policy issues if they choose not to. Networks usually do not sell issue advertising time. Recently, for example, one network refused to broadcast advertisements on global warming. The current regulatory approach therefore offers candidates greater opportunities to participate in political speech, since they are subject to equal time requirements, while other actors, such as party committees and organized groups, do not have similar opportunities to participate.

Previously, federal regulations sought to address some of these concerns through the Fairness Doctrine, which sought to ensure fair and robust debate by providing reasonable opportunity for access for the competing viewpoints in ballot campaigns. But this approach ended as a consequence of the FCC's elimination of the

Fairness Doctrine, and the court's affirmation of that action as being within the agency's discretion to change its policies.

Some participants felt that regulation along the lines of the Fairness Doctrine was needed, especially in those instances where one side in a ballot campaign held so significant a financial advantage that it was essentially able to dominate the public debate through paid advertising. Other participants acknowledged the significant effect the power of the purse might have in some ballot campaigns, especially when the advertiser is also a major commercial advertiser on a station and therefore less likely to be refused the opportunity to purchase time. But these observers also noted that burdensome regulations or efforts to place further controls on the allocation of advertising time were unlikely to provide a workable solution to the problem.

Providing access for political participants who are not candidates is particularly important because citizen participation through such mechanisms as referenda campaigns and public opinion polls is increasing. It is therefore essential that citizens have the information they need to cast their votes or render their opinions on policy questions. Moreover, as some participants observed, the individual citizen may take a more active role in politics as digital broadcasting matures. For example, the data transmission capabilities built into digital broadcasting will allow viewers to provide feedback to policymakers on key issues or proposed legislation, as well as facilitate participation in opinion polls, and perhaps someday allow citizens to express their preferences on ballot initiatives or cast their ballots from their own homes. Digital technology therefore offers the potential to enhance the capacity of individual citizens to participate directly in the political process and their own governance. But will the public have access to information that will encourage individuals to take advantage of these opportunities and be more effective citizens?

The Quality of Political Discourse

Even if candidates and other political actors can achieve the access they need to communicate their views to the public, there is no guarantee that their use of broadcast time will improve the quality of the information available to the electorate. Improved access may mean only "more of the same," that is, more spot advertising, which may expose voters to more information but is unlikely to elevate the level of political discourse throughout the nation. Similarly, an increase in the amount or frequency of news or public affairs programming is no guarantee of greater coverage of elections or government, or of the availability of better quality programs that will help citizens better understand public policy issues.

Indeed, a number of participants maintained that the recent increases in campaign advertising and news programming have not significantly improved the quality of public political debate. Much of the money spent on political advertising is used to broadcast negative campaign ads or simple statements and slogans that do not generate enthusiasm for candidates or help voters understand candidates' positions on the issues. News coverage is more useful to voters, and broadcasters' efforts to air more candidate debates and news interviews have made a valuable contribution in improving the information available to the public. Indeed, voters report that broadcast debates are the most useful source of information in making voting decisions. But, while the 1996 news coverage showed an increase in the attention paid to policy questions, many news reports still feature only brief soundbites of candidate statements, or devote a relatively small percentage of their political coverage to policy issues, choosing instead to emphasize the "horse race" aspects of elections and analyses of strategies and tactics. Such reports may heighten the drama in campaigns, but they do not provide the sort of information voters need to judge candidates on the basis of their policy views or to hold them accountable for specific actions once in office. Nor does such coverage necessarily increase voter turnout; it may even work to depress political activity.

Other participants observed that broadcasters are hindered in their efforts to provide more substantive programming by the current equal time regulations. The law exempts most news coverage and bona fide news events, including candidate debates, from equal time considerations. But other types of programming, such as a documentary on a particular candidate, are not exempted, which serves to discourage broadcasters from undertaking such projects, since they would be required to devote equivalent coverage to other candidates.

When broadcasters have made an effort to provide the public with the information it needs, viewers have not responded in an overwhelmingly positive manner. Often these programs garner relatively small audiences, which raises a question regarding the extent of viewer interest in receiving more political information. Moreover, when broadcasters have attempted to serve the public interest by sponsoring or agreeing to air candidate debates, which usually do attract wide public attention, their efforts have too often been undermined by the candidates themselves, who fail to agree to participate.

In addition, several participants noted, broadcasters have no control over the content of candidate messages, and thus cannot be held responsible for their educational value or the quality of their tone. The content of these ads is the sole responsibility of the candidate, and is determined by a candidate's decision and tactics, as well as by the public's responsiveness to the messages being aired. If candidates believe that the information-poor communication strategies seen in many recent campaigns will help them get elected, they will have little incentive to provide more substantive information to voters.

These problems and practices raise the deeper question of whether it is possible to adopt regulations or establish incentives that will encourage higher quality political communications without creating significant First Amendment tensions. Most participants were opposed to any regulations that might limit candidates' freedom to decide how best to communicate their views to the electorate or infringe upon the editorial freedom and discretion of broadcasters to make decisions about their programming. But many also questioned whether public demands for better information, or some system of voluntary incentives, would be an adequate means of achieving a notable improvement in the quality of political discourse.

REGULATING IN THE PUBLIC INTEREST

These issues, as well as others identified in the conference background materials, form the context for considering regulatory proposals designed to ensure the public interest in political programming. Conference participants explored the strengths and weaknesses of a range of proposals that encompassed different regulatory approaches and a variety of perspectives. Their purpose was not to determine a particular solution or consent to a basic regulatory approach. Instead, they discussed the merits of the leading alternatives in an effort to clarify the basic policy arguments or tradeoffs that should be taken into account when weighing alternatives. The alternatives discussed were (1) an adjusted public trustee model, (2) a play-plus-access model (based on a spectrum fee), (3) a spectrum fee/public information superhighway model, and (4) a free time model.

Adjusting the Current Public Trustee Model

Four steps could be taken under the current public trustee model to better realize the public interest in political programming: (1) revise the exemptions to the Equal Time Doctrine, (2) strengthen access requirements, (3) restore the Fairness Doctrine, and (4) rethink the lowest unit rate requirement.

Revise the Exemptions to the Equal Time Doctrine

Under current law, Congress exempts some candidate broadcast appearances from the Equal Time Doctrine contained in Section 315 of the Communications Act. Specifically, the equal time requirement does not apply to four types of broadcasts: bona fide news events, newscasts, news interviews, and news documentaries. Candidate debates are also exempt as bona fide news events, so long as broadcasters do not favor or disfavor any particular candidate.

One way to increase the amount of political programming and enhance the information available to the public may be to broaden this exemption, either by eliminating the equal time requirement for candidate appearances on all bona fide broadcast journalistic efforts, or by applying Section 315 only to paid time. Another approach would be to apply Section 315 only to those candidates who meet a certain threshold level of public support. If such a threshold is established, it should be low enough to ensure open and fair access to the air waves, but not so low that access is guaranteed to even the most fringe candidates. One idea, for example, is to grant equal time to candidates whose parties received 2 percent or more of the vote in a state in a previous election, or to a candidate of a new party who can gather petition signatures equal to 1 percent of the vote in a previous election.

Strengths. The idea is to allow broadcast journalists the same freedom as their print counterparts to inform the public through any and all bona fide journalistic efforts. Broadcasters would thus have the freedom to produce political programming without having to be concerned about providing equal time to all other candidates in a race. This reform would therefore provide broadcasters with an incentive to pursue innovations and air more political programming. It would increase the opportunities available to candidates to gain access to the air waves. It might be particularly helpful in generating additional coverage for candidates in state and local elections, since these elections presently do not receive as much attention from broadcasters as do the presidential race, major senate races, or other high-visibility contests.

Weaknesses. A number of participants noted that an easing of the equal time requirement may result in some candidates receiving substantially more coverage than others. It raises the possibility of a station promoting one candidate over another. Such imbalances in coverage already occur in some races; indeed, a couple of participants recounted instances of stations promoting one candidate more than another, and of some candidates finding it difficult to gain access to the air waves. So greater discretion for broadcasters may not mean greater access for all candidates. But, it was pointed out, this possibility of disproportionate coverage has existed in newscasts, news interviews, and the airing of bona fide news events since 1959, and yet the system has worked.

A couple of participants argued that this concern about unfairness could be addressed through public pressure; a candidate who is receiving unfair treatment could raise the issue and rely on the public limelight as a means of convincing a station to provide more equitable coverage. Yet, others noted that this approach has not always been effective in the past, and may not be of much benefit to minor party candidates or relatively unknown candidates, who do not enjoy significant public support and represent the candidates most likely to have trouble gaining access to the air waves in the absence of the equal time requirement. To this, it was pointed out that even with the equal time requirement, such minor candidates often do not gain access as a practical matter, since they lack the resources to purchase equal access, and since free time is not usually given to candidates if such time must also be made available to minor party candidates or fringe contenders.

Further, even if broadcasters do offer more political programming, there is no guarantee they will have an incentive to develop more substantive and higher quality programs. While some participants noted that news divisions will have an incentive to expand their offerings, there may not be sufficient public demand to support additional programming. Moreover, the desires of the news division, or even station managers, may have to be balanced against commercial concerns that may dictate other options.

Strengthen Access Requirements

Candidate access to the air waves could also be improved by strengthening the access requirements found in Section 312 of the Communications Act. This provision warns licensees that among the grounds for license revocation is the "willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for federal elective office on behalf of his candidacy." The act does not specify what constitutes "reasonable access" or provide comparable protection to state and local candidates. In addition, the requirement only demands that some broadcast time, either paid or free (such as in the form of a debate or free advertising time), be made available. It does not require that candidates be allowed to purchase time. Once one candidate is allowed to purchase time, however, other candidates must be given an equal opportunity to do so.

This provision could be strengthened to require that broadcasters make paid or free advertising time available to candidates, including some form of guaranteed access for state and local candidates. Or it could specify what constitutes reasonable access, in order to ensure that candidates will have ample opportunities for access to digital air waves, especially during prime-time periods.

Strengths. This step would increase the opportunities for access afforded to candidates, and help avoid situations where stations refuse to sell time to candidates for commercial reasons. Strengthened access requirements may also give broadcasters more of an incentive to sponsor candidate debates and forums as a means of fulfilling the time requirements.

Weaknesses. More detailed access requirements will reduce broadcaster discretion in allocating the time available for purchase, especially if protections are extended to nonfederal candidates. Such a requirement may prove burdensome to broadcasters, especially in major urban markets where a significant number of candidates may be seeking time. In addition, simply increasing the opportunities to purchase time will not reduce the financial pressures on candidates. Nor will it guarantee that other political speakers will have the access they need to communicate their views to the electorate. In fact, stricter requirements for offering candidates time may cause broadcasters to reduce the time they make available for other political advertising.

Restore the Fairness Doctrine

Concern about the access available to non-candidates led some participants to suggest a return to some sort of Fairness Doctrine to guarantee a certain amount of access to parties, organized interests, and other groups, especially with respect to ballot initiatives and referendum campaigns. While most participants did not call for an actual restoration of the Fairness Doctrine, which required broadcast licensees to provide coverage of important controversial issues of interest to the community and provide a reasonable opportunity for the presentation of contrasting viewpoints, it was suggested that a limited requirement designed to address major imbalances in the information available to the electorate should be considered. For example, broadcasters would be required to make time available to air competing viewpoints on major issues of interest to the community, especially with respect to ballot issues, when a major imbalance in the amount of time purchased or information available to voters exists, such as when one side of an issue has achieved an imbalanced ratio of four to one in the amount of time received on the air waves.

Strengths. This approach could enhance the level of public discourse on controversial public issues by helping to ensure a fair presentation of the competing viewpoints in policy debates. It would thereby improve the opportunities of non-candidate speakers to gain access to the air waves. It would be especially useful when one side in a ballot issue contest lacks the resources to compete with a well-financed opponent, which can often occur since there are few limits on the sources of funding or amounts that may be spent in ballot or referendum campaigns. It would thus reduce the role of financial resources in ballot campaigns, and provide a minimum level of access to different policy perspectives so that voters could be more fully informed of the issues in a particular debate.

Weaknesses. With the rise of digital television and its multicasting capabilities, there may be less need for a requirement of this sort. The increased number of channels and variety of new programming, especially if broadcasters are given greater freedom in covering political contests and controversies, may make such a requirement unnecessary, since voters seeking information on controversial public issues are likely to find it available somewhere on the spectrum. This general availability of information, however, even if it does come to pass, may not provide reasonable exposure to policy information to the broad majority of the electorate that does not specifically seek it out. Nor does it address the concern about significant imbalances in paid advertising, which is the information most likely to reach those viewers who might not otherwise be seeking information on policy issues.

Furthermore, instead of enhancing opportunities for access, a Fairness Doctrine, even in a more narrowly tailored version than the original, may serve to chill speech by discouraging broadcasters from providing time to parties involved in controversial public issues. This concern was aired in the debates that surrounded the Federal Communications Commissions' (FCC's) original decision to eliminate the Fairness Doctrine. While opponents of the doctrine contended that it chilled speech by encouraging broadcasters to limit the time given to controversial public issues, others claimed that this was not the case, and that any decision on the part of a broadcaster to choose not to air viewpoints on controversial issues would violate the first prong of the doctrine.

which establishes a duty on the part of broadcasters to devote a reasonable amount of broadcast time to the coverage of public issues. In considering the FCC action, the courts ruled that they could not resolve this dispute. A new requirement may resurrect concerns about this "chilling effect," or at least may cause broadcasters to limit the access given to one side in a controversy so as to avoid triggering the four-to-one (or some other) threshold.

At the least, enforcement will require constant monitoring by issue proponents throughout an election period to determine whether significant imbalances are actually occurring. Some participants noted that broadcasters adopted a more restrictive approach in providing access to speakers or causes covered by the Fairness Doctrine in part because it was an administrative burden. While the capacities of digital television may make it easier to provide coverage of issues and enhance the amount of time purchased by various groups, the administration of some sort of fairness requirement will be complicated and is likely to be administratively burdensome and difficult to enforce.

Rethink Lowest Unit Rate

One of the primary ways the current public trustee model attempts to achieve the public interest in political broadcasting is by requiring broadcasters to charge candidates the lowest unit rate on any advertising purchased in specified proximity to an election. The provision has helped to reduce the media costs incurred by candidates, but it has been difficult to enforce and is an administrative burden for broadcasters. Many conference participants noted, however, that this is a provision of current law that might be eliminated if some other regulatory alternative were adopted to help reduce the financial pressures on candidates or otherwise lower the barrier to entry for candidates seeking to access to the air waves. For example, elimination of the lowest unit rate might be warranted if broadcasters agreed to a regulatory approach that offered some form of substantial free time to candidates.

Strengths. Elimination of the lowest unit rate requirement would significantly reduce the administrative burden on broadcasters, and allow broadcasters to earn more revenue for the political time they sell to candidates.

Weaknesses. Eliminating the lowest unit rate provision would increase the costs incurred by candidates purchasing broadcast time. It would therefore exacerbate the financial pressures candidates already face. It may prove particularly detrimental to candidates challenging incumbents, who will have to raise more money to finance even the minimum level of advertising needed to become known to the electorate. This reform thus raises the possibility of higher barriers of entry for candidates and may make some elections less competitive than they currently are. But these potential problems could be alleviated by adopting regulations that would provide candidates with greater access and significant free time. Elimination of the lowest unit rate requirement should thus be linked to some other regulatory change that lowers barriers to entry and reduces the financial demands placed on candidates.

Implement a Pay-Plus-Access Model

A second model that received significant attention at the conference, and an alternative to the current public trustee model, was a spectrum fee incorporating a pay-plus-access regulatory approach. Under this option, broadcasters would be relieved of their public interest obligations, with the exception of some access and programming regulations, and instead would pay a fee that would be used in part to finance candidate broadcast advertising.

The major proposal discussed at the conference was to establish a spectrum fee equal to 3 percent of a broadcaster's gross revenues for a licensing contract of 15-20 years, and a tax of 1 percent on station transfers. One third of these revenues (i.e., 1 percent of gross revenues) would be used to finance political speech; the rest would be used to finance an enhanced public broadcasting system or other forms of worthwhile programming that currently are not adequately provided by commercial broadcasters. The political share of the monies would be allocated evenly to the major parties, with a proportionate share available for independent candidates and non–major party candidates. The funds would be divided on an equitable basis between national party committees and state party committees, who would be responsible for allocating the funds to candidates for the purchase of broadcast time. Broadcasters would be subject to certain access requirements in order to ensure that they set aside a certain amount of time prior to elections to be purchased by candidates. In addition, broadcasters could be required to provide linkages to public television station programming, as one way to encourage viewers to seek additional information on the candidates and issues.

Strengths. Broadcasters would have expanded discretion under this model. The approach would simplify the license renewal process since there would no longer be content requirements that stations would have to meet for license renewal. There would also no longer be a lowest unit rate requirement. Broadcasters would still, however, be faced with certain access requirements, including requirements for state and local candidates, since candidates would have to have the access needed to purchase time.

Candidates would get the access they need under this approach mostly in the form of paid advertising. But unlike the current system, this paid time would be free to candidates, since the funding would come from the party organizations, which are responsible for distributing the monies raised from broadcasters. The monies taken from broadcasters in the form of spectrum fees would thus be returned to stations in the form of time purchases. This approach would therefore help to reduce the financial pressures candidates currently face, or at least reduce the amounts they have to spend to achieve a basic level of broadcast exposure. Yet, the approach does not limit the political speech of candidates, since they would still be allowed to purchase additional broadcast time on their own, although not at the lowest unit rate.

This approach offers the best possibility of providing challengers with the basic level of exposure they need to become known to the electorate and thus competitive. In distributing funds, the parties are unlikely to devote significant sums to safe incumbents or candidates with little or no opposition; instead, they are likely to concentrate on competitive races and contests in which they have challengers seeking to unseat opposing parties' incumbents. This pattern for distributing funds has characterized party expenditures in recent elections, and is likely to extend to the allocation of television time, since the allocation of party resources is almost solely motivated by the desire to win elections. This regulatory approach is thus likely to enhance the competitiveness of elections, while giving party organizations a greater role in the electoral process.

Some conference participants felt that the effect of strengthening the role of party organizations in elections at both the federal and state level was an important possible benefit of this approach. By enhancing the resources and role of national and state party committees, this approach will help parties guard against the possibility of candidates with little attachment to a party or its principles trying to buy elections and acting as free agents—that is, running under the party standard, but not supporting the party or its platform. It may also help to reduce the incentive parties now have to raise "soft" money as a means of providing further assistance, albeit indirect assistance in the form of voter registration programs or issue ads, for their candidates.

Weaknesses. Given the estimated costs of converting to digital broadcasting, which may run as high as millions of dollars per station, and the uncertainty that exists with respect to the revenue flows broadcasters will achieve in a digital environment, the creation of a spectrum fee is likely to encounter significant opposition from broadcasters. A number of participants noted that some stations are already facing thin financial margins or are even operating at a loss. These participants felt that the costs this model would impose on broadcasters were too high, and would unfairly force broadcasters to bear the brunt of the costs for a program of reform. Some participants pointed out, however, that most of the fees assessed will be returned to the industry either to purchase time or pay for programming. And any additional political time purchased by candidates, as well as the time purchased by interest groups and other political speakers, will be available at full cost. Broadcasters can therefore expect some increase in revenue from the additional time purchased by federal candidates, since it will not be subject to lowest unit rate provisions.

Another shortcoming of this approach is that it will probably have little beneficial effect on primary campaigns. Party organizations are usually unwilling to intervene in primary campaigns, waiting instead for a nominee to be chosen before making an offer of party support. If the lowest unit rate provision is eliminated as part of this regulatory approach, candidates in primary campaigns will, on average, pay higher costs of advertising time, which will probably increase the barriers of entry for some candidates, especially those who are not well known or lack a viable base of financial support.

Other participants noted that another drawback of this plan is that it fosters the least valuable form of political information—spot advertising. The approach provides broadcasters with little incentive to provide higher quality political programming. It also may further discourage candidates from entering broadcast debates, since most will now be able to achieve a basic level of broadcast exposure. Candidates may therefore prefer to rely on purchased ads in which they control the content of the message, rather than the more open and less controllable formats offered by debates and forums.

Another concern was that this approach would not significantly reduce the financial demands of political campaigns. Since candidates can still purchase additional broadcast time under this approach, they will still be highly motivated to raise as much money as possible (including soft money for their party committees) and to spend as much as possible on broadcast ads. This is particularly true of incumbents, who will seek to gain advantage over challengers by using their resource advantage to gain greater access to the air waves. These participants, therefore, argued that free time should be combined with other campaign finance reforms (i.e., voluntary limits on expenditures as a condition of accepting free time) in order to achieve the best policy. Otherwise, the pay plus access model may simply "add fuel to the fire." But securing this additional campaign finance reform will prove difficult, especially given the opposition to spending limits exhibited by congressional incumbents, who usually outspend their opponents by substantial margins.

Implement a Spectrum Fee/ Public Information Superhighway Model

A third option, which better addresses the concern about higher quality political programming, is the use of a spectrum fee to finance an enhanced public broadcast system. The idea here is similar to that of the pay-plus-access model. But instead of spectrum fee revenues being used to pay for political advertising, they would be used to finance a greatly enhanced public broadcasting system that would serve as a public information superhighway. This enhanced public system would include linkages to repositories of information, providing viewers with access to the resources they need to gain more information about the topics covered in programs, as well as interactive capabilities to communicate with elected officials and government agencies. The system would also make free time available to candidates, increase citizen access to the air waves, and sponsor other worthwhile programs.

This proposal is not necessarily an exclusive option. Under a spectrum fee approach, the revenues generated could be apportioned in a way that provides a significant level of funding to public broadcasting to create a version of a public information superhighway, and also provides the funds needed for the pay-plus-access approach. In this variant, about 1 or 2 percent of gross revenues would be allocated to a public broadcasting system, and 1 percent to a fund for the purchase of political time. This mixed approach would provide candidates with the access they need, while at the same time increasing the likelihood of more substantive, high-quality programming on elections and controversial public issues.

Strengths and Weaknesses. The strengths and weaknesses of this approach, especially if it incorporates the pay-plus-access provisions, are similar to those identified in the pay-plus-access model. The approach is, however, likely to have two additional strengths. First, an enhanced public broadcasting system will help to address concerns about the quality of political information. Public broadcasting has demonstrated a strong willingness to offer better quality political programming through such efforts as experiments with free time for candidates, sponsorship and broadcast of candidate debates and forums, special programming on controversial public issues, and participation in civic journalism projects. These efforts are likely to expand under an enhanced system, offering candidates and citizens even greater access to the air waves, and providing voters with more information about politics and government.

Second, an enhanced public broadcasting system offers the prospect of greater opportunities for citizen participation. With the addition of digital capacity, stations will be able to offer citizens interactive opportunities to gain access to information, to respond to programming, and to participate in programming. Stations could also offer the means to contact candidates and government officials directly, or to express their views on policy issues.

On the other hand, an enhanced public broadcasting system, if it does not incorporate some form of pay-plus-access provisions, will not in itself provide candidates and other speakers with the type of access they need. While public broadcasting will offer access to the air waves, it will not provide access to the "attention economy" that is so important to candidates. That is, it will not reach those viewers who do not seek out political information. There would therefore still be a need for some sort of access requirements that would offer candidates the opportunity to purchase time on other broadcast stations.

Donate Free Time

A fourth possible option is to institute a system of free political time. Under this approach, broadcasters would not be assessed a spectrum fee. Instead, each television and radio station would be required to make available a certain amount of time that could be used by candidates free of charge to distribute their messages. One way to accomplish this end would be to establish some form of national broadcast bank to which each station would pledge two hours of broadcast time for use by candidates. This time would then be divided between the two major parties, with a proportionate share available to independent candidates or non–major party candidates, and allocated to candidates by the party committees. In this form, free broadcast time would be distributed in a manner similar to that suggested for the pay-plus-access system, but the currency would be minutes of time rather than the funds to purchase time.

An alternative, and less ambitious, method of distributing free time would be to tie the allocation of free time to the amount of time purchased. For example, for each two minutes of time purchased by a candidate, a station would provide one minute of free time. Such an approach would make more broadcast time available to candidates, but it would probably provide the greatest benefit to well-financed candidates, especially incumbents, who usually have more money available to purchase broadcast time. This approach would thus provide less of an advantage to challengers, and perhaps expand the disparity between challengers and incumbents with respect to the amount of exposure they gain over the air waves. This method of allocating time, while it may enhance access, may not improve the competitiveness of campaigns, and may not even provide challengers with the basic level of exposure they need to become well known to the electorate.

For this plan to be most effective, it will have to provide candidates with the time they need to reach both those citizens seeking political information and those who may be less attentive to politics. To ensure this latter audience, a free time plan might have to include carriage requirements so that candidates can use free time even in peak prime-time television or drive-time radio broadcasting hours.

Strengths. As with the pay-plus-access model, free time is likely to increase candidates' access to the air waves, while reducing the financial pressures on candidates, especially challengers, by creating opportunities to gain a basic level of broadcast exposure without incurring significant cost. It therefore offers the possibility of significantly lowering the financial hurdles candidates face, especially if enough time is available for parties to extend this benefit to primary challengers, who might each receive a minimal, but equal amount of time from the party. If the time is allocated by the party committees, it represents another option for strengthening the role of party organizations in the electoral process. And it offers the possibility of increasing the competitiveness of elections, in a manner similar to that described for the pay-plus-access model.

Free time advocates also contend that free time will help to improve the quality of political information made available to the electorate. The limited experiments with free time in the 1996 election cycle, where a few broadcasters offered candidates free time to air candidate responses to questions prepared by the stations, were generally less negative in tone and more directed towards a discussion of issues than other candidate advertising. This has led some to conclude that candidates will not use this time simply for attacks on opponents, but instead will make the most of this resource to share their views with the voters. Whether the 1996 experience, which was very limited, is indicative of the characteristics of a more nationwide time program is difficult to determine.

Some plans take specific steps to increase the likelihood that free time will be used as a vehicle for improving the quality of political discourse. In this variant, the regulations would include format requirements for any ads aired using free time. For example, some plans call for the candidate to appear in the ad or even speak directly to camera. The idea here is to prevent free time from being used to simply air pre-packaged commercials or the types of negative ads that have been prominent in recent elections. The problem with such requirements, however, is that they place restrictions on how a candidate may use free time and communicate his or her views, which raises constitutional questions under the First Amendment. These provisions therefore offer the possibility of improved discourse, but at the same time increase First Amendment tensions.

Weaknesses. Like spectrum fees, free time proposals face opposition from broadcasters who are concerned about the lost revenues the plan will entail. And unlike the pay plus access model, free time does not provide broadcasters with some offsetting revenue. Instead, the free time is offered in lieu of a spectrum fee as an obligation incurred for the right to use the spectrum. Some observers feel this approach to the "funding" of free time raises constitutional questions, and thus object to the plan on constitutional or other legal grounds.

Another concern, based on the limited experience with free time in 1996, is that the availability of free time will do little to improve the public's knowledge of candidates' policy positions or of the issues in a campaign. Relatively few viewers actually saw the free-time segments broadcast in 1996, and even fewer reported that the segments helped them decide how to vote. Those who did see the segments, while judging them less negative in tone than candidate ads, noted that they were often presented with many of the same misstatements and exaggerations found in the candidates' paid advertising. The limited experience of 1996 thus raises the question of whether free time will have much effect on the quality of political discourse.

One conference participant also noted that even if the legal issues associated with FCC regulation are resolved, there remain conflicts with federal election law. The Federal Election Commission (FEC) has ruled that the provision of free time to federal candidates by broadcast stations constitutes a contribution on the part of a corporation and is therefore prohibited under the provisions of the Federal Election Campaign Act.[3] In 1996, the Commission allowed the A. H. Belo Corporation and other stations to provide free time, but only because this time was judged to fit within the news exemption contained in Section 315 of the Communications Act. The Commission reached this determination because of the particular formats proposed for this free time—candidates were presented with questions prepared by the stations and their answers were filmed and broadcast. They were therefore comparable to news events.[4] If the news exemption in Section 315 is eliminated for digital broadcasting, as some have suggested, a change in federal campaign finance laws (or the interpretation of them) will also be needed to accommodate a program of free time.

The Commission has also expressed concern that the administration of any free time by stations might benefit incumbents or a station's favored candidate. This might result from a station's scheduling practices, which might give one candidate a preferred time slot. Some conference participants noted that this concern could be addressed by carriage requirements that might require back-to-back broadcast of messages by opposing candidates, or the airing of messages in similar time slots over consecutive evenings. Such provisions, however, would also have the effect of limiting broadcaster discretion in deciding when to air free-time messages.

Endnotes

1. See testimony of Bruce Allan, Vice President and General Manager of the Broadcast Division of Harris Corporation, to the Advisory Committee on the Public Interest Obligations of Digital Broadcasters, Washington, D.C., January 16, 1998.

2. See, for example, 47 U.S.C. 317, 47 CFR 73.1212[e].

3. See, among others, Federal Election Commission Advisory Opinions 1996-41, 1996-16, and 1996-2.

4. See Federal Election Commission Advisory Opinion 1996-41.

The Public Interest and Digital Broadcasting: Options for Political Programming

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America's system of broadcasting is a unique scheme that emphasizes responsiveness to local communities and places broadcasters in the role of public trustees for the frequencies licensed to them by the federal government. As public trustees, broadcasters are required to serve "the public interest, convenience, and necessity."[1] To fulfill this responsibility, Congress and the Federal Communications Commission (FCC) have imposed a number of statutory obligations on broadcasters. With respect to *political* programming, Congress has instituted a number of requirements, the most important of which are (1) that candidates are entitled to pay only "the lowest unit rate" for any campaign advertisements purchased in the period before an election, and (2) that a broadcaster that allows a candidate to use a station must provide equal opportunities or "reasonable access" to all other candidates for that office.[2]

In recent years, these political programming requirements have been a source of controversy. Some broadcasters, regulators, and others contend that the current requirements are burdensome and unnecessary, particularly given the opportunities for exposure provided to candidates by news programming, talk shows, cable stations, and satellite broadcasting. They therefore advocate elimination of mandatory responsibilities. For example, former FCC chairman Mark Fowler, who served during the Reagan administration, has called for deregulation of the broadcast industry, arguing that its public service requirements should be eliminated and that "the perception of broadcasters as community trustees should be replaced by a view of broadcasters as marketplace participants."[3] In this market perspective, the interest of the public is determined by the preferences expressed by the public, not by statutory requirement.

Others contend, in contrast, that the current requirements should be strengthened to better meet the public interest. In particular, according to this view, broadcasters should be asked to meet higher standards for political programming in order to enhance civic discourse and promote public debate. Former FCC chairman Reed Hundt, who served in the Clinton administration, and, more recently, President Bill Clinton himself, have called for the adoption of new regulations that would move beyond current law. In their view, broadcasters should be required to do more than provide "lowest unit rate" and "reasonable access" to serve the public interest; they should also be required to provide free time to candidates.

The distribution of the digital spectrum presents an opportunity to revisit the obligations imposed on broadcasters and resolve many of the issues involved in the current debate over how best to serve the public in using the nation's airwaves. As Chairman Hundt has noted, the allocation of additional portions of the spectrum for digital television offers a chance to "renew the deal between broadcasters and the public in a way that gives meaning to the public interest responsibilities of broadcasters. This . . . entails translating the broadcasters' duty to serve the public interest into a limited number of clear and concrete requirements—rules that are understandable and enforceable."[3] Exactly how this duty will be retranslated is yet to be determined. But the deliberations accompanying this process will certainly include a reenvisioning of broadcaster obligations in the area of political programming.

A number of regulatory options have been advanced for the political programming responsibilities of digital broadcasters. Most of these call for some form of reduced cost advertising or free time for political candidates. Free time has become an especially prominent alternative in recent years, since it is regarded not only as a valuable means of enhancing public debate, but also as a means of reducing some of the problems that plague the campaign finance system. But before any of these alternatives can be enacted into law, workable models or designs are needed.

This paper reviews some of the major options for redefining the public interest obligations of digital broadcasters in the area of political programming. Its primary purpose is to present the basic approaches or regulatory models that have been suggested to date, and outline some of the issues that will confront policymakers as they undertake the development of a new regulatory standard. The review is predicated on the assumption that constitutional questions and legal issues regarding the government's authority to impose broader responsibilities on digital broadcasting have been resolved.

AN OVERVIEW OF CURRENT REQUIREMENTS

The Equal Time Doctrine

The Communications Act of 1934, as amended, sets forth the basic federal rules governing candidates' use of broadcast media to communicate with the electorate. The primary regulation, known as the "Equal Time Doctrine," is contained in Section 315 of the Act.[5] Under this provision, any licensee who permits a legally qualified candidate for public office to use a broadcasting station, either by providing a candidate with free air time or by allowing a candidate to purchase advertising time at full or reduced cost, must provide equal opportunities to all other candidates for that office. The appearance does not necessarily have to be related to, or make mention of an individual's candidacy, to be considered a "use" entitling an opponent to an equal opportunity to appear. The requirement is triggered when the identity of a candidate who appears on a broadcast can reasonably be presumed to be known by the audience, or when the appearance is of sufficient magnitude to be considered an integral part of the broadcast.

This equal time doctrine is not absolute. Congress has exempted a broad range of appearances from the requirement: bona fide news events, newscasts, news interviews, and news documentaries are not subject to the equal time provision.[6] Candidate debates are also exempt, so long as broadcasters do not favor or disfavor any particular candidate.[7] This includes debates sponsored by broadcasters. The airing of a debate is not subject to equal time considerations because the broadcasting of these events is regarded as on-the-spot coverage of a news event. In 1983 the FCC sought to enhance the role of such debates in promoting political discussion by extending the exemption to include any rebroadcast of a debate.[8]

Reasonable Access

While federal law requires broadcasters to provide candidates with equal opportunities, it does not require that they allow candidates to appear on their stations in the first place. However, Section 312(a)(7) of the Communications Act warns licensees that among the grounds for license revocation is the "willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for federal elective office on behalf of his candidacy." What constitutes a "reasonable" amount of time is not clearly specified; generally, the amount of time provided must be reasonable in light of the importance of the race. The act also fails to clarify reasonable access requirements with respect to state and local candidates, since only federal candidates are mentioned. While broadcasters need not provide time to state and local candidates, once they do, all candidates for the relevant office must be provided equal time. Moreover, the FCC interprets Section 307 of the act, which grants licenses only "if the public convenience, interest or necessity will be served," to mean, in part, that stations cannot choose to avoid equal opportunities requirements by refusing to provide access. This suggests that even state and local candidates must be afforded some access, although there is no fixed formula by which to measure reasonableness in this instance.[9]

Section 312(a)(7) does not require broadcast licensees to *sell* time to candidates at any level of government. Licensees, for example, can fulfill their obligation by inviting candidates for specific offices to participate in forums and debates. The requirement is that some broadcast time, either purchased or free, must be made available.

Lowest Unit Rate

When a broadcast licensee does sell time to a candidate, the licensee must do so in accordance with Section 315(b) of the Communications Act, which notes that broadcasters cannot charge political candidates more than the lowest unit rate charged to any other advertiser for the same class and amount of time for a period beginning forty-five days before a primary election and sixty days before a general or special election. So, since 1972 when the Communications Act was amended to include this provision, federal law has required broadcasters to offer candidates a price comparable to the lowest rate sold to a most favored advertiser (usually a bulk advertiser who purchases blocs of commercial time) for a spot in a comparable time period. During other periods outside of the windows set forth in the law, the rates given political candidates cannot exceed the charges made for comparable uses for other purposes.

The Fairness Doctrine

Prior to 1991, FCC regulations also required broadcast licensees "to provide coverage of vitally important controversial issues of interest in the community . . . and to provide a reasonable opportunity for the presentation of contrasting viewpoints" on these issues.[10] This requirement, known as the "Fairness Doctrine," helped promote civic discourse on controversial public issues. It also had a distinctive role in enhancing public debate on ballot initiatives, since the FCC relied on the doctrine to ensure coverage of both sides of any ballot measure by requiring broadcasters to provide contrasting viewpoints, even if one side in a ballot campaign could not afford to purchase air time. This requirement was thus considered by many observers to make a valuable contribution to the fulfillment of a broadcaster's public interest obligations, since the other major provisions of the law, particularly the reasonable access and lowest unit rate requirements, only applied to candidates, and thus did not cover the rapidly growing use of broadcast media to promote ballot initiatives or referendum campaigns.

The Fairness Doctrine was highly criticized in the 1980s. In 1985, the FCC examined the effect of the Fairness Doctrine and argued that it no longer served the public interest. The Commission ruled that the requirement had the effect of chilling speech, since some broadcasters chose to air no viewpoints on public issues rather than provide time to the groups or interests aligned on both sides of an issue. The Commission further noted that the rapidly changing media environment diminished the need for the requirement: "The development of the information services marketplace makes unnecessary any governmentally imposed obligation to provide balanced coverage of controversial issues of public importance."[11] The FCC therefore eliminated the doctrine with respect to most controversial public issues in 1987, after a court decision asking it to consider the First Amendment claims involved in the issue.[12]

Congress opposed the FCC's decision, with many members contending that there remained a public need for the requirement, based on such traditional rationales as the scarcity of the available spectrum and the lack of balanced coverage on major public issues. In 1987, the Congress tried to codify the doctrine by passing the Fairness in Broadcasting Act, but a presidential veto ended the matter. Then, in 1991, the FCC extended its 1985 decision and repealed the doctrine for ballot initiatives as well, thereby ending this requirement.[14]

SERVING THE PUBLIC INTEREST: POLICY ISSUES AND CONTROVERSIES

Quality of Access

Changes in the media environment have provided candidates with many opportunities to broadcast their views; indeed, they now enjoy greater opportunities than ever before in our nation's history. The growth in the number of newscasts and television news magazines, the expansion of cable television, the rise of public affairs programming on cable, the increase in television and radio talk shows, the emergence of broadcast candidate debates, and the almost ubiquitous use of paid advertising have provided candidates with substantial access to the nation's airwaves. The federal regulations governing broadcasters have amplified these opportunities, making it possible for candidates to take better advantage of the opportunities offered by media outlets.

Because the media marketplace has changed, there is reason to question whether regulations are still needed to meet the public interest in the area of political programming. There is now more coverage of politics and more opportunities for candidates to appear on television or radio than there were fifty years ago when the FCC first established the Fairness Doctrine, or even twenty-five years ago when Congress amended Section 315 of the Communications Act. Are regulations still needed to ensure access and promote public debate?

This question is particularly relevant given that another transition is now taking place in the media and the means by which the public receives political information. The development of the Internet and the move toward digital television and media convergence suggest that candidates will have even more opportunities in the future. At least this is how some experts view the future.

The digital spectrum alone, with its exponential increase in the number of available frequencies that will allow broadcasters to hold licenses for multiple channels, will revolutionize the broadcasting industry. It will in all likelihood lead to an increase in the number of news programs and the amount of public affairs programming offered by broadcast licensees. Digital television, Web TV, or other forms of broadcast communications yet to be fully determined will thus increase the amount of information on candidates and public issues that is available to the public, especially if viewers or users demonstrate an interest in such information. This possibility stems from the premise that broadcasters in the future will operate in the context of an increasingly competitive media environment. They will therefore have a greater incentive to serve the needs of their audience. Licensees will have an incentive to provide the public with the information or types of programming they are looking for, and candidates may be able to take advantage of more competitive advertising rates. If the public seeks more public affairs programming and information about politics, stations will be willing to provide it.

Yet, despite the potential inherent in these future changes, recent experience suggests that further developments in the media marketplace do not obviate the need for regulation, especially with respect to the public's interest in promoting debate on major issues and enhancing the discourse in election campaigns. While notable changes have taken place in broadcasting and media competition, there has not been a commensurate improvement in the opportunities for candidates to share their views with the electorate or in the quality of the information provided to the public on major public issues.

For example, the expansion of news programming has not been accompanied by higher quality access for candidates via news broadcasts. In fact, the public's average exposure to the candidates has declined rather than increased. In 1968, the average "sound bite" from a candidate on the evening news was approximately forty-two seconds in length, and candidates' images appeared on the screen 84 percent of the time while they were speaking. By 1988, the average amount of time devoted to a candidate speaking was less than ten seconds, and broadcasts included at least six minutes of reporters providing their own analysis for every one minute of a candidate speaking.[14] By 1996, the average sound bite had declined further to about eight seconds, and each minute of news time devoted to the presidential race contained fifty-two seconds of commentary by reporters, anchors, experts, and other commentators. In fact, of all the network television air time devoted to the presidential race in 1996, 72 percent constituted stories or commentary by anchors and reporters; only 28 percent featured the candidates themselves.[15] And these figures are for the presidential contest, the most highly covered election in the country. Senate and House candidates receive significantly less coverage from major networks and cable channels than presidential candidates, and the same is true for major issues of public importance.

Nor do candidates or public issues necessarily receive balanced coverage as a result of the increasingly competitive media environment. For example, talks shows are one media form that has mushroomed since the elimination of the Fairness Doctrine. Relieved of concerns about the need to air all sides of major public controversies, broadcasters have scheduled more radio and television talk shows, which have proved to be a popular format among certain segments of the public, as well as an accommodating format for incorporating viewer comment and opinion into broadcast programming. While these programs offer additional opportunities for public discussion of candidates and issues, they do not provide the type of balanced coverage or discussion that best serves the public interest in promoting civic debate. One recent study of major radio talk shows, for example, found that, on average, fewer than 10 percent of the guests accepted on these programs hold views that disagreed with those of the host, and less than a quarter of the callers on air expressed views that opposed those of the host. "There is no presumption of both sides being given a fair hearing on the same platform," the study concludes. "Talk hosts are openly biased and usually structure their programs accordingly. Opposing views are granted diminished or no exposure."[16]

These examples of the limitations of news coverage and talk shows highlight a broader problem that characterizes the current media environment: candidates and elected officials have little opportunity for unmediated communication with the electorate. Broadcasters have continued to be resistant to the idea of making free time available so candidates can speak directly to an audience without the frames and filters common to most news shows and other broadcast programs.

One reason for this resistance is a concern for lost revenues, even though political advertising constitutes less than 2 percent of local stations' revenue and a small piece of the $30 billion-plus advertising pie.[17] Moreover, these revenues have increased substantially in recent years. According to the National Association of Broadcasters (NAB), overall advertising revenues rose $1.5 billion in 1995 and another $4 billion in 1996, for a total of approximately $36 billion.[18] In the Des Moines, Iowa, market alone, the increased demand for air time and additional spending generated by the presidential candidates brought an additional $5 million in revenues to the three local stations that cover the market.[19] But these aggregate figures mask the differentials that can occur among local stations, where, according to Television Bureau of Advertising estimates, 92 percent of the advertising is purchased.[20] One local station in Alaska, for example, reports that approximately $2 million, or about 10 percent of the station's $19 million in 1996 revenues came from political advertising.[21]

The most prominent example of free time, prior to the limited experiments of 1996 (discussed below), has been the time made available by broadcasters for candidate debates. But even these efforts are relatively limited. While debates have become a normal feature of presidential general elections (in large part due to the determined efforts of the Commission on Presidential Debates), the candidate forums that take place during the primaries are rarely broadcast. Moreover, even though the FCC has loosened the restrictions on the role of broadcasters in sponsoring and airing debates, many licensees still fail to offer time for this purpose. Consequently, even when we consider only the general election period, broadcast debates have not become a major feature of most federal elections.

While these free time issues have been a matter of debate for some time, one experience in the 1997 elections raises an even greater concern about future candidate access to the airwaves: the issue of whether candidates will be assured of *paid-time access* to broadcaster facilities. As noted previously, the reasonable-access provisions of the Communications Act specify the need to provide access to federal candidates. It sets forth no specific requirement concerning the access provided to state or local candidates. Stations might therefore refuse to offer advertising slots to state and local candidates if they can earn more from commercial advertisers.

In 1997, for example, the four most popular television stations in the Washington, D.C., market sharply reduced the amount of advertising time made available to candidates in the Virginia gubernatorial race and other statewide races because sales of political time were not as profitable as sales of commercial time. For just this reason, and with just three weeks to go before Election Day, Washington's major network affiliates announced that they would limit air-time purchases by the Virginia gubernatorial candidates by about 40 percent, even though almost one-third of the Virginia electorate is covered by the Washington market. WJLA-TV, the local ABC affiliate, further noted that it would sell no more discounted time to candidates for the offices of lieutenant governor and attorney general.

Prior to this announcement, the stations had already begun limiting the time available to candidates, providing only enough time to allow the average viewer to see the gubernatorial candidates six or seven times, as opposed to the ten or twelve viewings requested by their campaigns. "It's strictly supply and demand," said one station president and general manager. "We can't turn over all time to political candidates, because they're here once every four years, and our other advertisers are there fifty-two weeks a year." Another noted that his station was being "a good public citizen" by offering state candidates any time at all, even at full market rates (40 percent higher than the discounted rates for political advertising).[22]

The 1997 Virginia experience is noteworthy because it raises the question of whether current regulations adequately guarantee the ability of candidates, particularly nonfederal candidates, to engage in unmediated communication with the electorate. It also merits consideration because it involves the primary means by which candidates share their views with the electorate—paid advertising. If stations begin to adopt policies that restrict the amount of candidate advertising, the amount of information available to voters may be significantly reduced. Moreover, if they move towards offering time to candidates, at least nonfederal candidates, at commercial market rates, this will only serve to exacerbate the fundraising demands on candidates and the trend towards rising campaign costs.

The Cost of Paid Advertising

Under current regulations, the purchase of time to air commercials is the principal way candidates for federal office speak directly to voters, without mediation. Paid advertising has become the principle means by which candidates communicate their views to the electorate, and broadcast licensees have been willing to provide candidates with reasonable access to pursue this form of communication. Indeed, paid advertising has become such a pronounced feature of federal elections that many advocates of regulatory reform, as well as many advocates of campaign finance reform, have cited the rising costs of television advertising and its effects on the overall costs of political campaigns as a justification for regulation as the nation moves toward an era of digital broadcasting.

Since 1968, the amount spent on political campaigns has grown from an estimated $300 million to $4 billion, a more than twelvefold increase.[23] Even when adjusted for inflation, the rise in spending is significant. For example, from 1976 to 1996, the Consumer Price Index rose by slightly more than 300 percent, while political spending rose more than 700 percent.

This growth in campaign spending has been led by the increasing sums spent on campaigns for federal office. Over the past two decades, the total amount spent by candidates seeking a seat in the House or Senate rose from $115.5 million in 1976 to $765.3 million in 1996. In the presidential race, total spending by candidates seeking the major party nominations has grown from a total of $114 million in 1976 to $348 million in 1996.[24] Average House expenditures during this period rose from $73,000 to $493,000, while the average Senate campaign cost grew from $595,000 to $3.3 million. For winning candidates, the costs were even higher. The average amount spent by House winners in 1996 was about $680,000, while Senate winners spent an average of $3.8 million. Even when controlled for inflation, spending levels in congressional contests have more than doubled since 1976.[25]

No one factor can explain the growth that has taken place in the costs of campaigns. Changes in the size of electoral districts, innovations in campaign strategies, new technologies, shifting levels of competition, and the behavior of candidates and political groups all contribute to the changes that have taken place in recent decades. But among these various explanations, the most commonly cited factor is the growth in spending on media advertising, particularly advertising on television and radio.

Paid television and radio advertising has become an increasingly prominent component of political campaigns since the 1960s. National and statewide candidates rely on television to communicate their views to the large electorates they hope to represent. The cost of this advertising has had a major effect on the costs of campaigns. The Television Bureau of Advertising estimates that all primary and general election candidates for federal, state, and local offices spent a total of $24.6 million on television advertising in 1972. By 1996, candidate spending on television had reached $400 million. Even when adjusted for inflation, the increase is substantial. In constant 1996 dollars, total advertising expenditures grew from $92.3 million in 1972 to $400 million in 1996.[26] This represents a real increase of more than 300 percent over the last six presidential election cycles.

The cost of political advertising thus has been a major factor in encouraging greater campaign spending. Although it is not the only factor that has promoted the growth in the costs of federal campaigns, no other expense constitutes so significant a share of campaign spending as does electronic advertising. According to recent studies based on detailed examinations of Federal Election Commission disclosure reports, major-party Senate candidates in 1992 spent 42 percent of their funds ($91.8 million) on electronic media advertising, including payments to media consultants, direct radio and television air-time purchases, and advertising production costs. Major-party House candidates that year spent 27 percent of their monies ($88.2 million) on electronic advertising. As these figures indicate, television and radio advertising does not play as great a role in House races, in part because almost one in six House districts is in a major urban area where television advertising may not be cost effective, and in part because many incumbents are in safe districts or face no serious challenge, and thus do not need to engage in heavy advertising. In fact, more than one-fourth of the House incumbents seeking reelection in 1990 spent no money at all on broadcast advertising. In the most competitive House contests, however, advertising costs often represent more than 30 percent of a candidate's campaign budget. Moreover, these previous patterns may change as House contests become more competitive and more members do not hold well-entrenched seats. House incumbents, for example, nearly doubled their average spending on television and radio advertising between 1990 and 1992, raising these expenditures to 25 percent of their total outlays. Similar spending patterns characterized Senate and House races in 1992 and 1994.[illegible]

Where television spending is most significant is in presidential races. In 1996, for example, President Bill Clinton allocated 52 percent ($59.1 million) of his campaign expenditures to media advertising, while his opponent Senator Robert Dole devoted 46 percent ($53.9 million) to this cost. In the general election campaign alone, both candidates spent over 60 percent of their campaign funds on advertising, with Clinton devoting 63 percent of his budget to this cost and Dole 61 percent of his.[28]

As these figures suggest, television advertising has had the greatest effect on spending in the larger elections—the presidential and senate contests—where broadcast media are needed to communicate with the electorate and consequently make up a greater portion of a campaign budget. But it represents a significant cost at all levels of federal contests.

These rising costs of television and radio advertising have focused critical attention on the lowest unit rate regulations of current law. Broadcasters and candidates have both criticized the regulations. Broadcasters contend that the regulations are cumbersome and complicated, making it difficult to comply with them. The problems largely stem from the problem of determining the "lowest unit charge" given the increasing complexity in the ways broadcast time is packaged and sold. Stations offer commercial advertisers three types of rates: "fixed rates," for time that is not preemptible, which means that the ad is guaranteed to appear at a certain time; "prevailing or effective rates," which apply to ads that are highly likely to be broadcast as planned; and "preemptible rates," which are the least expensive but whose ads are the most likely to be moved if another advertiser is willing to pay more for a slot. The charges for slots may vary significantly depending on the week, month, time period, amount of time, and audience ratings. Commercial advertising practices have been so dynamic that the FCC has had to regularly promulgate new regulations to try to adjust the lowest unit rate requirements to changing practices. For example, the FCC issued policy statements on the lowest unit rate regulations in 1988, 1991, and 1992, but the criticisms have continued.[29]

Broadcasters note, however, that they have made good-faith efforts to comply with the rules, at a significant cost savings to candidates. According to the NAB, the lowest unit rate provision is responsible for a 30 percent discount for advertising time purchased by candidates.[30] Others question whether the provision is so efficacious. A 1988 study by the Center for Responsive Politics concluded that "since 1971 most television stations and some radio stations have abandoned the use of rate cards which set advertising rates, adopting in its place a system best described as an auction. Political consultants, campaign managers and members of Congress all agree that in the decade and a half since it took effect, lowest unit rate has become eviscerated by changes in the way broadcasters sell advertising time."[31]

This general finding of the 1988 report was confirmed by a 1990 FCC audit of thirty television and radio stations in five selected cities during part of the 1990 election year. The preliminary findings revealed that a majority of the stations were charging candidates more for advertising than they were charging other customers. In one city in one week, all candidates who purchased advertising time paid in excess of the highest rate paid by any commercial advertiser. In one case, political candidates paid an average of $6,000 for a thirty-second spot, while the average cost for commercial advertisers was $2,713. The audit also found that some stations were creating new classes of time for candidates, called "news adjacencies,"[52] for which there were no comparable commercial rates and thus higher rates were assessed.[53]

One other factor that has been cited to explain some of the problems encountered with the lowest unit rate provisions is the time-buying practices of political campaigns. Many campaigns use media consultants or professional time buyers to purchase ad time and plot media strategies. In purchasing time, these professionals are often more interested in acquiring certain time slots on particular programs or time slots targeted at specific demographic groups than they are in purchasing time at the lowest costs.[54] They may even have less of an incentive to purchase time at the lowest rates since they are sometimes paid on the basis of a percentage of the total cost of the time purchased.[55]

Quality of Public Debate and Political Discourse

Even if the lowest unit rate requirement does significantly reduce the costs of advertising time for candidates, there are those who question the value of its contribution to serving the public interest. At best, lowest unit rate requirements help to promote public debate by allowing candidates to purchase thirty-second or sixty-second spot ads at a reduced cost. Its primary effect is thus to allow candidates to get more time for their dollar. It does little to address the imbalance in resources between incumbents and challengers in political campaigns, or the communications gap that can occur in ballot initiative campaigns when a well-financed group is pitted against a poorly financed opposition. Some advocates of regulatory reform contend that these concerns should be the focal point of regulatory efforts. In their view, the public interest is best served by improving the quality of public debate and creating greater balance in the presentation of contending views.

Under current FCC regulations, all qualified candidates are able to take advantage of the lowest unit rate on those stations that offer candidates the opportunity to purchase time. In practice, this regulation primarily benefits incumbents seeking election for federal office, because they have more money and can therefore buy substantially more time. How much more? In recent elections, incumbents have usually outspent their opponents by a margin of three or four to one. This resource gap diminishes the level of competition and the robustness of the debate in congressional elections because challengers lack the resources needed to become well-enough known to effectively challenge an incumbent. As several studies have noted, the problem facing challengers is not simply that they are outspent by the officeholders they oppose; rather it is that they lack the resources needed to become well known by the electorate.[46] In particular, challengers often lack the resources needed to mount the level of advertising needed to enhance their name recognition. According to one major study, challengers need to raise $250,000 or more to improve their name recognition significantly, and expenditures up to $500,000 can increase the level of public awareness of a challenger's candidacy from 22 percent of the electorate to 75 percent.[47]

The problem, however, is that few challengers ever reach these levels. For example, in 1988, only 68 challengers raised $200,000 or more, while 17 reached the $500,000 mark. The comparable figures for 1990 were 60 and 17; in 1992, 91 and 15; and in 1994, 122 and 45.[48] In other words, only about 30 percent of the individuals who face incumbents raise even the minimum amount needed to wage a viable campaign. It is therefore not surprising that almost half the voters in a typical House district cannot recall or recognize the name of the candidate running against their representative in Congress.[49]

This disparity in the resources usually available to challengers and incumbents has led some advocates of regulatory reform to argue for a change in the current conception of the public interest obligations of broadcasters to include the distribution of *free* television time. This free time is seen as a means of providing challengers with a minimal level of broadcast air time. In this way, the regulations will promote civic debate by ensuring the presentation of all viewpoints in a campaign, and may further help to enhance the robustness of public debate and perhaps stimulate greater electoral competition.

Advocates of free time further note that this regulatory approach may also help address another policy concern: the inadequate quality of the political discourse that takes place in elections. Most of the communications in elections consist of spot advertisements, a large share of which are designed to cast an opponent in a negative light. One survey of advertising in presidential campaigns, for example, found that in 1980, 60 percent of the prominent ads were negative ads; 74 percent were negative in 1984; and 83 percent were negative in 1988. Sixty percent of the "typical ads" aired in 1988 were also negative. The percentages declined in 1992, but were still substantial, with negative ads constituting 66 percent of the prominent ads aired and 44 percent of the typical ads.[40] And these patterns are not unique to presidential contests. In recent years, a substantial share of the ads aired by House and Senate candidates also consisted of negative attacks on an opponent.

Advocates of free time contend that the regulatory process can be used to reduce this emphasis on negative spot advertising and thereby enhance the quality of political discourse in elections. Specifically, they argue that format requirements attached to a free time obligation, such as stipulations that a candidate appear in an ad or personally address the audience in a message, will discourage candidates from using free time to advance negative attacks. Instead, candidates will use this time to make more substantive appeals to the electorate, thus improving the political information voters receive and enhancing the quality of political debate.

THE EXPERIENCE WITH FREE TIME

In 1996, some broadcasters engaged in an initial experiment with the free time alternative. In February 1996, Rupert Murdoch, head of the Fox television network, announced that his network would provide free time segments to the leading presidential candidates during the month prior to Election Day in November. His proposal, which was endorsed by the Free TV for Straight Talk Coalition, led to a series of discussions that did not produce a standardized plan or approach, but did convince a number of networks to offer some form of free time to presidential candidates during the general election period.[11] This free time was made possible in part by an FCC ruling that exempted free time from the equal time requirement of Section 315.

During the last two months of the 1996 presidential campaign, CBS, CNN, FOX, NBC, PBS, and UPN, as well as National Public Radio, each donated air time to broadcast recorded mini-speeches by Bill Clinton and Robert Dole. CNN also made time available to air statements by Ross Perot (Reform Party), Harry Browne (Libertarian Party), John Hagelin (Natural Law Party), and Howard Phillips (U.S. Taxpayers Party). Fox, CBS, and NBC separately tailored the content of the messages broadcast; the other networks and National Public Radio all broadcast the same set of candidate messages. The segments aired over periods of five to twelve days, depending on the network. The allocation and format of the time offered varied significantly.[12] These differences are evident from a review of the approaches used.

- Fox broadcast ten one-minute segments on Tuesdays, Saturdays, and Sundays in September and October at various times between 7:30 and 9:30 p.m. EST. The candidates' messages aired back to back and were made in response to ten questions posed by the network.

- CBS offered four two-and-a-half-minute segments that aired as a special feature during the *CBS Evening News* from October 21 to 24. The candidates' statements aired back to back and were made in response to four questions posed by the network. CBS also aired the segments on *CBS This Morning* and the overnight news program *Up to the Minute*, and on fourteen CBS-owned stations during the late local news from October 21 to 28. CBS-owned radio stations aired the segments five times each during the final two weeks of the campaign and rebroadcast them the weekend before Election Day.

- NBC provided five ninety-second segments that aired as a special feature during *Dateline*. Paired statements were aired back to back and made in response to five questions posed by the network.
- CNN, PBS, UPN, and National Public Radio aired the same statements, which were determined by the candidates themselves. The statements were two-and-a-half minutes each and began airing on alternate nights beginning October 17. CNN aired the statements during *Inside Politics*, PBS just before 8 p.m. EST, UPN at the conclusion of local evening newscasts, and National Public Radio on *All Things Considered*.

These major networks were not the only broadcasters to offer free time in 1996. A. H. Belo Corporation, a Dallas-based chain of seven network-affiliated stations in Dallas, Houston, New Orleans, Norfolk (Va.), Sacramento, Seattle, and Tulsa, became the first commercial broadcaster to offer free time. Belo offered five-minute blocs of time to candidates for governor, U.S. Senate, and House in the markets served by its stations.[illegible]

A study of the free time offerings of the major networks conducted by the Annenberg Public Policy Center tended to confirm some of the major arguments advanced by advocates of this reform. This research found that the segments were less negative in their content than the ads prepared by the candidates, had proportionately more policy information than comparable broadcast news reports, and were found to be useful by nearly three-fifths of those who saw them. However, most of the electorate never saw even one of these spots. Only one-fifth of the electorate saw one of the segments, and they tended to be the most politically informed and interested voters. This was in part a function of the fact that the segments were not well promoted and were erratically scheduled, making it difficult for viewers to determine the time of their airing.[illegible]

While the reviews of the 1996 experiments were mixed, some stations have been encouraged enough to press on with this option. In 1997, Philadelphia's WCAU-TV offered three New Jersey gubernatorial candidates (Republican Christine Todd

Whitman, Democrat Jim McGreevey, and Libertarian Murray Sabrin) twenty-five seconds daily during the week of October 27 at the end of the 4 p.m. local evening news to share their views on education, taxes, urban development, the economy, and car insurance. Three other Philadelphia stations agreed to show these prerecorded messages on the weekend before the election. The New Jersey Network, a public television station, also provided free time. It allowed candidates to tape statements at its studio and aired them after the late news at 11:25 p.m. But the New York commercial stations, which cover a significant part of New Jersey, refused to provide even the mere twenty-five seconds of time that the Philadelphia station offered.[45]

More recently, two other free time proposals have been announced. PBS has announced its intention to give congressional candidates free slots during prime time to discuss their platforms in advance of the 1998 midterm elections. The network also plans to offer free time to presidential candidates again in 2000.[46] ABC News Chairman Roone Arledge has also articulated a free time plan, based on a different approach. He has offered one free hour of time to the party presidential nominees in 2000 to be used to air an hour-long debate that will have no moderator or commercial breaks.[47]

OPTIONS FOR REFORM

Given the experience under the current regulations and the changes forthcoming in the media marketplace, what, if anything, should be done to ensure that the public interest with respect to political programming is realized? Specifically, what, if anything, should be done in conjunction with the major transition about to take place, the move from analog broadcasting to digital broadcasting?

The allocation of the digital spectrum ultimately will provide unparalleled opportunities for broadcasters. It will provide licensees with a capacity for more channels, greater flexibility in programming, and a superior capacity for distributing information and providing candidates and voters with a means for political discourse. It will also provide licensees with a major asset, the right to broadcast on the spectrum, which has been valued at anywhere from $10 billion to $70 billion. What public interest responsibilities should accompany the grant of this asset? Are any statutory obligations needed given the potential capacity for political programming inherent in the multimedia, multichannel media environment that will be created by this new technology?

Advocates of reform have offered a host of options for changing the current rules. These range from a deregulatory approach that will rely on market incentives to more structured solutions that would require broadcasters to provide free time to candidates. Each of these proposals is based on the view that there is a vital public interest to be served by promoting public debate and providing information to the electorate. Each also seeks to realize this public interest by calling for an approach that: (1) constitutes a significant contribution towards realizing the public interest; (2) recognizes and reduces any possible First Amendment tensions; (3) creates incentives for broadcasters to serve the public interest; and (4) provides an effective means for enforcing public interest obligations. At the same time, the notions proposed seek to ensure that that they are not unduly disruptive of broadcasters' schedules, leave licensees with the greatest possible discretion as to actual programming decisions, and provide enough flexibility to accommodate the dynamic changes that will undoubtedly take place in the digital media marketplace.

Basic Issues

The major regulatory reform options in the area of political programming raise a number of basic issues that form the framework of much of the discussion of future broadcaster obligations. Aside from the constitutional issues, there are a number of pragmatic policy questions that need to be answered by any new proposal. Different models answer these questions in different ways, and they should be kept in mind when considering different alternatives.

- What changes will the move to digital broadcasting occasion for political discourse, especially candidate access and public issues debate?

- With the changes that will accompany the advent of digital broadcasting, does there remain a continuing public interest in providing the citizenry with political broadcasts and in guaranteeing candidates access to broadcast facilities?
- If so, is this interest well served by the current regulatory structure?
- If there is a public interest and it is not well served by the current regulations, is it a better approach to rely on market-based incentives or are further regulations necessary?
- If a market approach is to be preferred, what are the changes taking place in the market place that will serve the public interest in political broadcasting?
- If regulation is to be preferred, is the problem one of strengthening the current statutory approach or are additional obligations needed?
- If regulation is to be preferred, should the rules apply equally to federal and nonfederal candidates or should federal candidates be treated differently? If so, why?
- If regulation is to be preferred, should the rules encompass ballot initiative or referenda campaigns, or major public policy controversies, as well as candidate elections?
- If there are to be further regulations for political programming, should these be applied solely to television and radio licensees? Should they also be applied to Internet access or web-based "broadcasting"?

Deregulation of Political Programming

Throughout the 1980s, the FCC eliminated some of the political programming obligations imposed on broadcasters as public trustees, most notably the major provisions of the Fairness Doctrine. The agency also eliminated some of the content regulations governing commercials and programming, such as nonentertainment programming requirements imposed on radio licensees. These actions were part of an evolutionary movement towards deregulation of the broadcast industry, or "unregulation" as then FCC Chairman Mark Fowler called it, since it consisted of a policy that did not call for the elimination of regulations, but rather a review of every regulation to eliminate those that no longer furthered the public interest.[48]

This move towards deregulation was based in part on the notion that one of the traditional rationales for government regulation of broadcasting, the scarcity of the spectrum, is no longer as compelling as it once may have been. When the Communications Act of 1934 was first adopted, there were fewer than 900 radio stations and no television stations. By 1985, there were over 900 television stations, 4,785 AM radio stations, and 3,771 commercial FM stations.[49] Television broadcasting has also changed dramatically, as recent decades have seen a shift from a broadcasting environment dominated by three major networks to an environment that includes a growing number of networks and the addition of cable and satellite broadcasting systems. As a result, the average television home now receives forty-five channels, and nearly a third of those homes receive sixty channels or more.[50] The shift to digital television will further expand broadcast capacity, multiplying the number of available channels exponentially. Thus, with the shift to digital broadcasting, there will be a further move from scarcity to abundance.

This "technological plenty" has led some observers to reconsider the role that competition can play in broadcast regulation.[51] In this view, the competition that has been created in the marketplace by technological innovations has obviated the need for structural regulations and content requirements to serve the public interest. Instead of regulatory requirements, market forces should be allowed to work to meet the public interest in political programming. This model thus calls for an end to program regulations that prescribe minimum amounts of nonentertainment programming, lowest unit rate requirements, and other political speech rules.

The deregulation model is based on the argument that the proliferation of communications outlets has created a competitive marketplace in which broadcasters will determine the informational and programming needs of their audiences through normal market mechanisms. In their quest for viewers and in part as a demonstration of their public spiritedness, broadcasters will provide a variety of programming options and a diversity of viewpoints that will meet the desire for information expressed by viewers. Content regulations will therefore be unnecessary, as will access requirements, since the new competitive marketplace will provide more public affairs programming and political information than ever before. So long as the public demonstrates an interest in such programming, broadcasters will provide it.

Advocates contend that this approach is more efficient than a regulation-based programming model and avoids any First Amendment concerns. It does not entail the possible chilling effects that may accompany regulatory requirements, as in the case of the Fairness Doctrine, and does not limit a licensee's flexibility in developing programming and content. They also point to the changes that have already taken place as indicative of the possibilities for the future. More public affairs programming and coverage of major public issues are now available as a result of the increase in the number of broadcast news magazines, talk shows, public affairs shows, candidate debates, and the rise of PBS, CNN, C-SPAN, and CNBC, among others. Many local stations have sponsored candidate forums, and now networks and stations are beginning to experiment with voluntary free time. These developments are seen as supports for the position that "the government has little role, if any, in guaranteeing for the public 'suitable access to social, political, esthetic [sic], moral, and other ideas and experiences.'"[52]

Critics of this approach note that market incentives do not guarantee that the public interest in political programming or in promoting public debate will be served. If political programming does not draw the audience licensees are seeking, or the demographics that commercial advertisers most desire, it is likely to be reduced. Given the wide range of entertainment programming and multimedia programming that will be available with digital broadcasting, political programming will face greater competition and broadcasters may, over time, find it to be a less desirable alternative. There is also no guarantee that unpopular viewpoints will be broadcast or that controversial issues will be aired.

In addition, there is no guarantee that broadcasters will provide candidates with reasonable access or make adequate amounts of advertising time available, especially if more valuable commercial advertisers are competing for the same time slots. If time is made available, the absence of the lowest unit rate requirements will result in higher advertising costs (as much as 30 percent higher if NAB estimates are correct), thereby increasing the costs of campaigns and the pressures on candidates to raise money. Or licensees may prefer commercial advertisers willing to purchase blocs of time or pay higher prices for particular slots. Such was the case in Washington, D.C., in 1997, despite the current regulations on reasonable access and lowest unit rate. Is there any reason to believe that this problem will not become more commonplace in an marketplace with no regulatory obligations and even greater competitive pressures for audience ratings and revenues? Wouldn't there be an incentive to grant preference to advertisers who represent steady or longer term sources of revenue, or advertisers willing to enter into multimedia or multichannel arrangements, rather than the less frequent and often transitory political advertisers?

If time is made available, it may only be offered on a highest bidder basis, especially for the most desirable prime time and drive time slots. This could place additional upward pressure on campaign costs. It may also give an unfair advantage to wealthy candidates or well-financed campaigns. This advantage may actually give well-financed incumbents an even greater level of access relative to their opponents than that which they currently enjoy under the lowest unit rate requirements.

One way to ensure that candidates are not excluded from the purchase of advertising time or otherwise unduly restricted from the use of broadcast facilities is to maintain some form of reasonable access requirement. Yet, even with this modification, questions remain as how to define "reasonable access" and enforce such a standard.

Spectrum Fee Models

Another objection raised to the market approach is that it fails to recognize the value of the spectrum—of the right of exclusivity a licensee enjoys to broadcast on assigned frequencies. Even some advocates of market approaches admit that licensees could justifiably be charged a spectrum usage fee or other assessment as a partial return on the right to broadcast. Such a fee would recognize the value licensees receive from their grants of exclusivity, similar to the value operators receive from government-franchised offshore oil rights. It would also help to provide some competitive balance in delivery systems; for example, while broadcasters are granted spectrum for free, cable operators usually have to pay a franchise fee to licensing municipalities. The spectrum fee model would thus require "the users of government services to pay their way."[54]

The idea behind the spectrum model is that the monies generated by a spectrum fee could be used, at least in part, to finance a public broadcasting system or "democracy network" that would provide the citizenry with public affairs programming, candidate broadcasts, debates, and other political programs. This could include a multimedia channel that offered video, textual, and audio information, as well as background material and direct information from candidates. This system would ensure that the public interest in political programming is served and provide candidates with the access they need to communicate with the electorate. Citizens interested in receiving political information would thus be assured of a broadcast vehicle to meet their needs.

The viability of the spectrum fee approach would in large part depend on the amount of the fee and its administration. Some proposals call for a fee that simply reflects the value of the spectrum, while others include the costs of licensing and enforcement and administration in an effort to create a system that pays for itself. Most proposals call for a fee of one percent of gross revenues, and in 1982 the National Radio Broadcasters Association suggested a plan of fifty-year licenses tied to a spectrum fee of one percent of station revenues.[54] Others have suggested a shorter term, higher rate, such as 3 percent of revenues over a five-year period, with the receipts to be placed in an endowment fund that would be used to support the public broadcasting system. Another approach would be to assess a transfer tax every time a station is sold.

One of the major concerns advanced against this approach is that it may actual serve to reduce the electorate's exposure to information on candidates and major public issues, and thus fail to adequately promote public debate and fulfill the public interest in political programming. Segregating the primary responsibility for public affairs programming and candidate information by vesting it in a public broadcasting system may reduce the broad electorate's exposure to political information. It might segment the audience so that only those who regularly view public broadcasting or take the initiative to seek out an assigned public channel will gain significant exposure to political information. The creation of a separate public broadcasting system or "democracy network" might also encourage some broadcasters to reduce their political offerings or limit the access provided to candidates, since they no longer have a primary responsibility to offer these services.

The debate over the spectrum fee model is therefore also a debate over the best method of delivering broadcast information to the electorate. One view is that a set location or channel is the best delivery mechanism, since it provides voters with a clearly identified and fixed source. Viewers can turn to this channel(s) for the political information they are seeking whenever they like. The other view is that the public interest in providing information to the electorate is best served when the information is broadly distributed throughout the spectrum. This perspective is based on the notion that the creation of an informed electorate may require the broadcast of information to audiences whether they are seeking it or not. Also, candidates will continue to desire to reach a broader audience than the viewers of public broadcasting systems. They therefore require access to an array of broadcast facilities and channels.

Strengthening the Current Public Trustee Regulations

The desire to preserve the widest possible access to broadcast facilities has led to many proposals that seek simply to strengthen the current public interest obligations of broadcast licensees and to extend them to digital broadcasters.

The most common proposal in this regard is to change the lowest unit rate provisions of current law. Most of the bills that have been advanced in Congress in recent years to accomplish this end would require broadcasters to make advertising time available to candidates at a substantially reduced cost, usually 50 percent of the lowest unit rate. This new reduced-cost rate would be required of broadcasters as a condition of their licenses. Most of these proposals apply these regulations, too, solely to federal candidates, although some plans also include candidates for statewide offices.

Many reduced-cost proposals include provisions designed to avoid the enforcement problems that have been encountered under the current lowest unit rate regulations. One idea is to require stations to provide rate cards to candidates so that rates are clearly disclosed and easily determined. Another notion is to require broadcasters to sell fixed time to candidates at the lowest preemptible commercial rate and forbid them from bumping a candidate's spots.[55]

A reduced-cost requirement will improve candidate access to broadcast facilities, but will have, at best, only a tangential effect on the discussion of major issues or public policy controversies. For these reason, some advocates of reform have called for the application of reduced-cost requirements to ballot initiatives and referenda campaigns. The thinking behind this proposal is that ballot initiative campaigns are another area of political finance that has grown dramatically, with some ballot campaigns now exceeding the costs of major federal candidate contests. Moreover, in many ballot campaigns in recent years, the funding has been distributed in highly disproportionate ways, producing imbalances in which one side dominates the air waves, while an underfunded opposition struggles to get its message out. This imbalance in the airing of diverse views can be particularly meaningful in ballot campaigns, because these contests tend to be characterized by more malleable voter opinion. One comprehensive study of ballot campaigns, for example, found that significant opinion changes occur in three-fourths of ballot proposition campaigns, a figure three times as high as that found in candidate contests. The reason for such dramatic shifts, according to this analysis, was that "voters on propositions are less sure of their voting intentions, less knowledgeable about the proposition contests, and probably more susceptible to campaign appeals."[56]

Another option often suggested to address concerns about ballot initiatives and the discussion of public issues is to restore the Fairness Doctrine. Advocates of this position contend that this rule is essential if there is to be a guarantee of some semblance of informational balance in public referenda.

Free Time Proposals

Opponents of reduced-cost time proposals or of a restoration of the Fairness Doctrine warn that these proposals are likely to suffer from the same shortcomings that have characterized the application of these principles to analog broadcasting. They note that the proposals are likely to place cumbersome compliance demands on broadcasters; they will result in wealthy candidates or well-financed incumbents demanding that an even greater amount of broadcast time be made available for purchase; and they will be difficult to enforce.

These concerns have led to a call for a free time requirement for candidates. Advocates contend that, given the value of the spectrum being provided to licensees, and the expanded capacity that will accompany digital broadcasting, the time has come to require broadcasters to make some time available to candidates at no cost to the candidates to share their views with the electorate and thereby promote a more informed electorate.

The notion of free time, which has been proposed in some form since at least the early 1960s, has gained increasing popularity in recent years as a result of the continuing struggle to reform the campaign finance system, the efforts of the Free TV for Straight Talk Coalition and other advocates, the adoption of the idea by former FCC Chairman Reed Hundt and President Clinton, and the experiments with voluntary grants of free time beginning in the 1996 elections. The idea has also sparked a heated debate over its constitutionality, as well as it applicability to our largely market-driven broadcast system. This controversy also raises questions concerning the need for free time and its potential salutary effects. These questions, and the disputes that stem from them, largely follow the outlines of policy debates and rationales reviewed in the earlier part of this paper.

Much of the current debate over free time centers upon the broader legal controversies and disputes as to the rationales that might be used to justify a free time obligation. But there are also a host of practical policy questions regarding the structure and implementation of a free time plan. In recent years there have been a number of efforts to begin the process of crafting a free time broadcasting requirement, most of which vary greatly in their details. These details often raise more questions than they answer, but they offer an essential starting point in considering this alternative.

While it is not possible to review all of the details of the various free time ideas that have been advanced, any free time requirement will have to address a number of basic issues. These issues include the amount of time to be made available at no cost, the eligibility for access, the distribution of time, carriage requirements, format considerations, and related conditions, among others. Assuming that free time is determined to be a justified obligation that serves the public interest, these issues will have to be confronted if a feasible requirement is to be constructed.

How Much Time?

A fundamental question to be addressed with respect to any free time proposal is the question of how much time or comparable support a broadcaster should be required to provide as a condition of licensing. Proposals vary, but they generally call for formulas that would either require each broadcaster to make available a set amount of air time for each election cycle, or require that all candidates receive a set amount of free time in each cycle. Most plans call for a requirement that would constitute less than one percent of all advertising time. The range runs from a requirement that broadcasters provide an amount of free time comparable to current levels of paid political advertising, to a requirement that every television and radio station make eight hours of free time for political advertising available each year, to a requirement that each licensee provide two hours of free broadcast time to each qualified candidate in a statewide or national election.

One problem with such set formulas is that they fail to account for the variations in the use of broadcast time in different markets. For example, some races rely on advertising time more heavily than others, so that two hours of time may be too much for candidates in some districts but inadequate for all statewide candidates in California. One way to address this concern may be to establish an endowment or "time bank" that allows broadcasters to deposit amounts of time or some monetary equivalent (the financial value of time or a percentage of a spectrum fee), which would in turn be used to finance vouchers that would be distributed to candidates for use in obtaining air time. This approach offers greater flexibility, but it may involve more complicated administrative structures.

Should Broadcasters Be Compensated?

If licensees are required to provide free time, should they receive some compensation for the lost potential revenue? While the time is free to candidates, the costs are borne by broadcasters. Most advocates of free time contend that the value of the spectrum and the right of exclusivity to broadcast that is granted to licensees is ample compensation when compared to the small comparative value represented by a free time obligation. Others suggest that broadcasters receive some form of compensation, such as a tax deduction for the fair market value of the free time made available, a reduction in a spectrum usage fee (if any), or an ability to impose a surcharge on the paid advertising purchased by candidates. Many of the free time proposals put forward in the late 1970s and early 1980s sought to resolve this problem by providing government subsidies to broadcasters who offered free time. But such an approach is unlikely to be enacted in the current budgetary and political environment.

Who Should Be Eligible for Time?

Another threshold question is that of deciding which candidates will be eligible to make use of free time. Most proposals call for free time for federal candidates. Yet, if this obligation is being justified on the basis of a public interest in offering access to the air waves, in creating an informed electorate, and in helping to alleviate the financial pressures on candidates, there is also good cause for extending this benefit to at least candidates seeking statewide office. Elections for major statewide offices are increasingly as dependent on paid advertising as U.S. Senate races, a development that is reflected in the rapidly rising costs of these state contests. A notable share of campaign spending also occurs at the local level. And while these local candidates rarely rely heavily on paid media, a significant number might benefit from some allocation of free radio time or Internet access.

Beyond the level of election is the question of the candidates themselves. Should at least some portion of free time be made available to all legally qualified candidates? Should it be reserved for the general election nominees of the major parties? Should it also be extended to major party nomination campaigns? If it is limited to major party general election contests, is this unfair to independent candidates (e.g., Representative Bernie Sanders of Vermont)? What about nonmajor party nominees?

It may be infeasible to provide an adequate amount of time to all candidates who have legally qualified for the ballot. The availability of free time is likely to spur demand for broadcast time, especially if it is available to all qualified candidates, since a share of these candidates who lack the resources to engage in paid advertising under the current system are likely to take to using broadcast facilities if they are made available for free. Such increased demand would either (1) force broadcasters or a time bank to diminish the amount of time available to each candidate, thereby reducing the informational value of this benefit, or (2) impose an excessive burden on broadcasters who might not be able to meet the demand by candidates, or who might suffer unfair financial losses because of the number of candidates they would have to accommodate.

If all legally qualified candidates can not be accommodated, what are the criteria for determining eligibility? Most proposals readily accept major party nominees as eligible for free time. They differ dramatically once they move beyond this point, especially with respect to nonmajor party candidates. Some proposals require candidates to raise a threshold number of small contributions or certain share of total receipts from small contributions to qualify for free time. But this standard may be difficult to administer, since it will require a rolling qualification scheme. Others require that nonmajor parties receive a certain percentage of the vote in a previous election, or gather a certain number of petition signatures, or register a certain level of support in opinion polls. Unless workable criteria can be developed for determining eligibility, free time may suffer from the problems and controversies concerning candidate participation that affected the presidential debate process in 1980, 1992, and 1996.

How Should Time Be Distributed?

This question is perhaps the most difficult and logistically complicated issue attendant to free time proposals. This complexity can be judged from the simple fact that there are currently about 211 media markets in the United States, whose "areas of dominant influence" (ADIs) have no concordance with geographic or political boundaries.[57] Some districts or states include multiple media markets. Others, such as New Jersey, have no "hometown station," but instead rely on the New York and Philadelphia markets for most of their broadcast coverage. New York City, on the other hand, represents a market that covers thirty-five to forty congressional districts. Other highly populated areas also tend to have expensive media markets that cover a number of districts.

These logistical considerations are further complicated by the fact that the use of paid media varies greatly among candidates. Some House races currently use little or no paid media, while others devote significant resources to this area. Some candidates find that, in their constituencies, radio is more effective than television. Some candidates spend significant amounts on paid advertising in one election year but not in another. All candidates, if given the opportunity to use broadcast time without having to pay for it, are likely to decide that they need it.

What these observations indicate is that some system will be needed for distributing free time among candidates and among highly variable districts. One proposal goes so far as to crudely align districts and media markets, apportioning shares of free time to individual candidates based on the share of a district's population that resides within a given media market.[58] Such an approach could easily turn into an administrative and regulatory nightmare.

Most proposals seek to avoid putting broadcasters in the position of having to distribute time and try to minimize administrative responsibilities by making political party organizations responsible for determining which candidates should receive time and how much each should receive. This view is based on the notion that the party organizations are in the best position to determine the needs of their candidates and the politics of individual races. Free time would thus be another asset that parties allocate in coordination with their standard-bearers, just as they now determine the allocation of party contributions to candidates and coordinated expenditures made on behalf of candidates. And if parties follow the patterns exhibited in their coordinated spending preferences when distributing free time, it is highly probable that the vast majority of this time will be used to support challengers or open-seat candidates rather than incumbents.[59]

One problem with this party-based distribution mechanism is the problem of independent candidates, or candidates running under the banner of parties that are not as highly centralized or structured. Who, for example, would be responsible for determining the allocation of time for candidates who decide to run as Reform Party candidates? But if party organizations are not the entities responsible for determining the distribution, what body or agency should serve this function?

Should There Be Format Requirements and Carriage Specifications?

Assuming that free time can be feasibly distributed, how should it be aired? Should there be clear and standardized formats for the airing of free time? Should it be left to negotiations between the candidates and media outlets? Or parties and licensees? Should the free time be segmented into thirty-second spots? sixty-second spots? longer "mini-speeches" of two to five minutes? half-hour telecasts or hour-long debates?

One of the rationales advanced for free time by advocates is that free time can help to enhance the quality of political discourse. But if it is to achieve this purpose, it must be used in different ways or convey different types of messages than traditional paid advertising. The fact that this time is free does not improve public debate; it is the content of the message and its conveyance to a large, receptive audience that offers this possibility. Free time proposals therefore often include some type of format restrictions or carriage regulations.

The most common format requirements are time minimums and an appearance by the candidate. The time minimums usually call for segments no shorter than thirty seconds, while sometimes expressing a preference for longer segments, as a means of encouraging candidates to provide more information to the electorate and perhaps more thoughtful presentations. The candidate appearance stipulation usually requires that a candidate appear on camera throughout the free time advertisement and speak on his or her own behalf in any free radio spots. These format restrictions are designed to improve the accountability in political communication by providing a mechanism for clearly linking a candidate and his or her message. It is hoped that such an approach would offer a higher toned and less negative messages or discourse than that provided in the paid advertising that now constitutes much campaign communication.

Critics of these requirements note that candidates should have maximum discretion to determine how they would like to communicate their views, and broadcasters should be granted flexibility in the ways they may schedule and segment free time offerings. In their view, these format and content requirements heighten First Amendment tensions and may not be able to withstand judicial scrutiny. Others note that these requirements represent only marginal improvements at best. The thirty-second format simply continues the tradition of spot advertising as the principal means of communication in campaigns, which means it continues a poor format that tends to rely on slogans, soundbites, and small bits of information, rather than a clear, informative presentation of views. A candidate's appearance in an ad may help to tone down particularly severe or distortive rhetoric, but it will not end negative attacks. The Annenberg Center study of the 1996 free time messages, for example, found that while free time broadcasts contained less "pure attack" and less inflammatory language than debates or paid ads, they did not end the "negativity." Instead of pure attack, candidates criticized their opponents through "comparison" and by providing evidence to back up their statements.[60]

Finally, some free time proposals attempt to specify carriage requirements in order to ensure that free political messages will be seen by a large audience and receive good exposure. Usually the proposals specify that at least some of the time be aired in prime time television or drive-time radio slots to help ensure large audiences. These specifications are also designed to guard against broadcasters airing free slots during off-peak hours or low-rated programs. The proposals also seek to ensure that free time messages are scheduled in the period close to an election, so that they air when the electorate is focusing its attention on political campaigns.

While these types of provisions go a long way towards trying to ensure the effectiveness of any free time obligations, some observers contend that they do not go far enough to fulfill the public interest in promoting public debate and creating an informed electorate. Some analysts, for example, have argued that broadcasters should be required to provide much more substantial blocs of time if campaign discourse is to be improved and more information is to be provided. One model of this approach is the "Nine Sundays" proposal developed by the Joan Barone Shorenstein Center at Harvard University in advance of the 1992 election. Named for the number of Sundays between Labor Day and Election Day, the plan called for a series of presidential candidate debates, interviews, and addresses that were designed to move presidential campaign communications away from thirty-second spot ads and negative attacks. Under this proposal, broadcasters would provide time free of commercial interruption throughout the general election campaign to air a series of three debates (two between the presidential candidates and one between the vice presidential candidates), five sets of thirty-to-forty minute interviews with the presidential contenders, and paired fifteen-to-thirty minute addresses by the presidential candidates on the Sunday before Election Day.[61] Similarly, former presidential candidate John Anderson has called for the creation of a National Endowment for Presidential Debates, patterned on the Corporation for Public Broadcasting, that would be responsible for carrying out a series of twelve presidential and vice presidential debates and "issues conferences" that would begin on Labor Day weekend each election year and continue through to the week before Election Day.[62]

CONCLUSION

The transition to digital broadcasting offers a unique opportunity for reexamining the public interest obligations that should accompany the allocation of the digital spectrum. The move to digital broadcasting will further the development of a multimedia, multichannel media marketplace that will exercise a dramatically expanded broadcast capacity and a substantial increase in the sources of information available to users. How will this new technology change the ways candidates communicate with the electorate and the ways voters receive information and engage in political discourse?

Some analysts believe that the new technologies will expand the number of information alternatives available to the public, increase the quality and amount of political programming on broadcast channels, and present a diversity of viewpoints that will promote public debate. The advent of digital broadcasting will therefore obviate the need to impose public interest responsibilities on licensees, since the basic rationales for such standards will no longer apply or will be realized through market phenomena.

Others disagree, noting that a number of problems with respect to the accessibility of broadcast facilities, the costs of political communications, and the quality of political discourse will endure. In this view, the public interest can only be realized by defining the public responsibilities of broadcasters and creating regulatory structures that will encourage them to meet their obligations. There is disagreement, however, on what these obligations should be. Moreover, each of the proposed approaches raises fundamental questions as to how well it will serve the public interest.

The issues raised in this rapidly moving debate over the political programming responsibilities of digital broadcasters form a sound framework for thinking through possible alternatives and defining the criteria that should guide future policy discussions. By meeting this challenge, we will gain a better sense of the public interest to be served by digital broadcasting and the steps needed to achieve it.

Endnotes

1. The Communications Act of 1934 §309.

2. 47 U.S.C. §309(a).

3. Mark S. Fowler and Daniel L. Brenner, "A Marketplaçe Approach to Broadcast Regulation," *Texas Law Review* 60 (1982): 209–210.

4. Reed Hundt and Karen Kornbluh, "Renewing the Deal Between Broadcasters and the Public: Requiring Clear Rules for Children's Educational Television," *Harvard Journal of Law & Technology* 9 (Winter 1996): 16.

5. The Communications Act of 1934 §315.

6. However, if a broadcaster airs a news documentary on a candidate, the equal time provision does apply. The exemption for documentaries only applies to documentaries in which the appearance of a candidate is incidental to the subject matter.

7. This decision was made in response to a petition filed by the Aspen Institute Program on Communication and Society. See *Aspen Institute*, 55 FCC 2d 697 (1975), *aff'd sub nom. Chisholm v. F.C.C.*, 538 F.2d 349 (D.C. Cir.), cert. denied, 429 U.S. 890 (1976).

8. *Regarding Petitions of Henry Geller and the National Association of Broadcasters and the Radio-Television News Directors Association to Change Commission Interpretation of Certain Subsections of the Communications Act*, BC Docket 82-564, FCC 83-529. The decision was published in the Federal Register 48 (25 November 1983): 53166.

9. Herbert E. Alexander and Anthony Corrado, *Financing the 1992 Election* (Armonk, N.Y.: M. E. Sharpe, 1995), 231.

10. Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C. 2d 143, 146 (1985).

11. Inquiry into Section 73.1910, 246.

12. *Meredith Corporation v. F.C.C.* 809 F.2d 863 (D.C. Cir. 1987).

13. For a discussion of the administrative and legislation debates on the Fairness Doctrine during this period, see Robyn R. Polashuk, "Protecting the Public Debate: The Validity of the Fairness Doctrine in Ballot Initiative Elections," *UCLA Law Review* 41 (December 1993): 392–442. For a discussion of the role of the Fairness Doctrine in the years after its adoption, see Steven J. Simmons, *The Fairness Doctrine and the Media* (Berkeley: University of California Press, 1978).

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16. Davis and Owen, *New Media and American Politics*, 90.

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18. Cited in Robert Gluck, "Why TV is Addicted to Campaign Cash," *George*, March 1998, 73.

19. Gluck, "Why TV is Addicted to Campaign Cash."

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21. Amy Keller, "Debate About Free TV Time Gets Audience From Rules," *Roll Call*, 16 May 1996.

22. Spencer S. Hsu, "TV Stations Curtail Discount Ads for Virginia Campaign," *Washington Post*, 14 October 1997, A1.

23. Alexander and Corrado, *Financing the 1992 Election*, 21.

24. Totals for congressional and presidential candidate spending are based on data reported by the Federal Election Commission.

25. Joseph E. Cantor, *Congressional Campaign Spending: 1976–1996*, Congressional Research Service Report 97–793 GOV (Washington, DC: Library of Congress, August 1997), 1.

26. Data reported in Joseph E. Cantor, Denis Steven Rutkus, and Kevin B. Greely, *Free and Reduced-Rate Television Time for Political Candidates* (Washington, D.C.: Congressional Research Service, 7 July 1997), 5.

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29. For a discussion of these issues and the FCC actions, see Cantor and Rutkus, *Free and Reduced Television Time*, 8–11.

30. Cited in Amy Keller, "FCC Gets Ready to Force Free Time Issue," *Roll Call*, 17 April 1997, 25.

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A Proposal: Media Access for All Candidates and Ballot Measures

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> The sharply rising use of television and radio broadcasting by presidential candidates in the United States poses serious problems that affect politicians, the parties, the voters, and the very fabric of our democratic process. . . .It is the task of policymakers to ensure that technology itself does not alter our fundamental political principles, that men remain the masters of technology and not the other way around.
>
> —*Voters Time*, A Report of the Twentieth Century Fund Commission on Campaign Costs in the Electronic Era (1969)

INTRODUCTION

The above warnings by a distinguished panel of Americans have largely gone unheeded. Congress has done virtually nothing in the past twenty-nine years to ameliorate this country's worsening problems with political broadcasting—other than to hold hearings and to decry the status quo. The Federal Communications Commission (FCC) has even compounded this neglect by *repealing* the Fairness Doctrine as it applies to ballot measures, thereby depriving voters of the opportunity to hear competing views regarding the measures on which they are asked to vote.[1]

During this same period, the costs of campaign technology have skyrocketed. Politicians continue to pour rapidly increasing sums into paid radio and television advertising, to the point that many candidates spend more time raising funds to purchase media time than they do discussing relevant issues. But despite this explosive increase in paid media, it would be difficult to argue that voters are about candidates and issues than they were thirty years ago.

One reason is that political advertisements are too often shallow, distorted, trivial, and mean. Thirty-second, negative "hit pieces" typically highlight flaws or omissions (sometimes minor, distorted, or even fabricated) in an opponent's record (a controversial vote, a personal indiscretion) and then magnify them to monumental proportions. These ads attack, but they rarely propose reforms, and they also fail to communicate much significant information. Responsible elected officials who have taken public stands on controversial issues are discouraged from seeking reelection out of fear that thirty-second political ads will distort their positions out of proportion. Those who do run for office are encouraged to state their views in the blandest of terms (such candidates are invariably "for education"), hoping to immunize themselves from attack.

Public attitudes toward elected officials continue to worsen. A *Los Angeles Times* poll reported that 53 percent of Californians believe their legislators are "taking bribes," two-thirds think "most state legislators are for sale to their largest campaign contributors," a large percentage believes "state government is pretty much run by a few big interests rather than for the benefit of all the people," and the average respondent thinks that nearly one-third of legislative and executive branch members attained their positions "by using unethical or illegal methods."

Despite, and to a certain extent because of, negative political advertising, voter turnout has now dropped from 63 percent in 1960 to around 50 percent in national elections, the lowest average of any industrialized democracy. In some local races, voter turnout has dropped to 10 percent. Low voter participation effectively turns representative democracy into a *surrogate democracy*, allowing a small percentage of the population to select a government for the rest.

There are, of course, causes for voter dissatisfaction other than negative political advertising—most significantly, campaign financing abuses. But the problems of campaign financing and political television are inextricably interrelated. The need of candidates to raise money is often fueled by the more fundamental need to purchase expensive media time.

Digital broadcasting offers new opportunities—if not to start afresh, then at least to rethink older problems in a newer context. If digital television broadcasters are able to transmit up to ten channels of standard television programming in one new six-megahertz channel allotment, then frequency "scarcity" problems are diminished. What is still needed, however, is a comprehensive approach to the problems of political broadcasting, one that applies to both the newer digital channels and the older analog ones.

GOALS AND OBJECTIVES OF MEDIA REFORM

Even piecemeal political media reforms have been difficult to achieve—as the past three decades of inaction demonstrate. Yet there is merit in attempting to consider what a system of comprehensive political media reforms might look like. The following is such an attempt.

Thinking broadly, for comprehensive political media reforms to be successful, they should address at least the following goals and objectives:

Applicability to All Elections

Inadequate media coverage of political campaigns adversely affects the fabric of democracy at *all* levels of government—in campaigns for federal, state, and local office as well as campaigns around ballot measures. Presidential elections, to be sure, are vitally important to the nation, and improvements in media coverage for these races are highly desirable. But voters are also deeply concerned with state and local issues. Up to 20 percent of all American political money is spent at the local level, and ballot initiatives in many states have become the principal engine driving policy and political change—in some California election campaigns, for example, more money is spent on a single ballot measure than on all the general election presidential candidates combined. True political media reform in this country should thus be applicable to all candidate elections—for president, senator, representative, governor, state legislator, county supervisor, city mayor, and city council member—as well as to all state and local ballot measure campaigns.

Candidate Control Over Messages

News coverage of candidate and ballot measure campaigns on television, radio, and in print is clearly important and desirable, as are candidate debates and news interviews. But they cannot substitute for messages directly shaped by the candidates or ballot measure campaigns themselves. Candidate and ballot initiative committees must be able to create, control, and deliver their own messages in their own ways. This goal requires some system of candidate and ballot measure committee "access" to the media, whether on a paid, reduced cost, or free basis.

Candidate Choice of Media

Candidates in some races need access to television to be competitive, but in other races they need access to *media other than television*. Because TV is the most desirable medium for political persuasion, and because its costs per voter reached are reasonable in those places where its coverage is coterminous with the electoral district, candidates will always prefer television if they can afford it. In smaller races, however, high costs make it prohibitively expensive for most candidates. For candidates who run in districted races (for Congress, state legislature, county supervisor, city council) and local ballot measure committees, the reach of television or radio is far broader than their district boundaries and thus too costly per actual voter reached. For these candidates, direct mail is the medium of choice.

Reform proposals cannot focus exclusively on television. Media reforms must give candidates and ballot measure committees flexible access to media other than television and radio—such as direct mail and political leaflets. (Newspapers and magazines are generally ineffective in political campaigns.) Media reforms should not be "ghettoized" to the new digital television media. Broadcast reforms should be applicable equally to digital and analog television as well as radio.

Free or Substantially Reduced Media Costs

Media costs are currently so high that many highly qualified potential candidates choose not to participate in electoral politics at all, while others must devote most of their time to fundraising—leaving them little time to discuss substantive issues, forcing them to avoid positions disliked by their contributors, and tainting them with the appearance of being unduly or corruptibly subject to influence by their larger contributors. At the same time, even the most brilliant political ideas cannot be communicated without a substantial media budget. Political success has become dependent on a candidate's fundraising abilities or personal wealth, rather than on the power of his or her ideas. Political media reform must therefore provide candidates and ballot measure committees at all levels with some significant ability to reach the voters—either by subsidizing their media purchases or by providing them with no-cost or substantially reduced-cost media access.

Limitations on Media Formats

Merely providing free or reduced-cost media to candidates and ballot measure committees will not solve all informational deficiencies. Without additional media reforms, negative advertising may easily continue poisoning the well. New formats for media messages may be needed, not just a new form of paying for them. Reforms should link the provision of free time to appropriate media formats.

Integration into Broader Campaign Finance Reforms

Providing candidates and ballot measure committees with free or reduced-cost media should not be a policy considered in isolation. Media coverage and campaign financing problems and solutions are interrelated. Candidates are pressured to raise enormous sums of money in substantial part to pay for increasingly costly media time. Public financing would help defray these costs, but without expenditure ceilings it would simply pour gasoline on a fire that is already raging—allowing candidates to spend even more money on uninformative or negative advertising without diminishing their demand for unlimited private funding. Free media time would help candidates, but it would also allow them to redirect the money saved to negative television ads or other forms of communication. Media reforms must thus be tied to broader campaign finance reforms—most importantly, to expenditure ceilings and public financing.

SOME PROPOSED REFORMS

The following proposals outline a comprehensive system of media reforms for all campaigns, varying with the size and nature of the campaigns. For presidential campaigns, senate and congressional campaigns, the most important reforms concern broadcast time, carriage, format, payment, campaign financing, new sources of public financing for primaries, purchase of additional broadcast time, equal time and other political regulations, and provisions for minority party candidates. An abbreviated list of the above concerns is important for reform of state and local campaigns. For ballot initiative campaigns, salient reforms concern information flow, funding, lowest unit rate provisions, and the Fairness Doctrine.

U.S. Presidential Candidates

Broadcast Time

Presidential candidates of major political parties[2] who voluntarily agreed to limit their overall campaign expenditures would receive two-and-a-half hours of free time thirty to sixty days before the general election on each analog and digital television station, analog and digital radio station, and national cable television network in the nation.[3] This time would be split between two distinct uses: programs and spots.

Programs. One and a half hours of this time would be available in program lengths of at least a half hour, and candidates could combine them into longer programs if they wished. These half-hour and longer programs would be controlled by the candidates and would allow them to explore issues in greater depth. Debates would be handled separately.

Spots. The remaining hour of time would be available to candidates in the format of short spot-announcements thirty to sixty days before the election. Different formats are possible, for example:

- **Candidate-controlled spots.** One half of the remaining hour allotted to candidates during this period would be in the form of fifteen two-minute spots created directly by the candidates themselves. These spots would allow candidates to reach a wide audience by capturing the attention of viewers watching other programs. They would also allow candidates to respond to each other's positions nightly as the campaigns developed—creating, in effect, a serial debate. A two-minute spot is long enough to discuss a specific issue, yet short enough to avoid losing the majority of viewers to another channel. As an alternative, candidates could be given two one-minute spots per evening for thirty days before the election or one one-minute spot per evening for sixty days before the election.
- **Mini-debate spots.** The other fifteen two-minute periods could be devoted to mini-debate formats, in which a citizen, reporter, or "celebrity" (e.g., Oprah Winfrey) would ask a question (for thirty seconds) and the candidates would provide back-to-back responses (for forty-five seconds each).

Both long and short program formats are necessary. Broadcast stations are on the air an average of nearly thirty thousand hours in a four-year period (assuming an average broadcast day of twenty hours), so a total of five hours of time granted to the two major party candidates combined would comprise a minute fraction (0.00017) of any station's overall programming time.

Carriage

The candidates' longer programs would be broadcast simultaneously, and in prime time, on all radio and television stations and national cable networks, creating a programming "roadblock" that viewers and listeners could not avoid. The remaining hour of spots could be broadcast on individual stations at times chosen by the candidates. Carriage of this time would be in addition to carriage of any debates organized by the candidates themselves or by other organizations such as the League of Women Voters.

Format

Candidates would be required to appear personally in at least 80 percent of each program segment and spot ad. This stipulation would allow up to 20 percent of the remaining time in each program or spot to include "produced" material (films, charts, interviews, and other graphic programming). This restriction would require candidates to present their ideas to the public personally, and in their own words, and it would allow the public to judge them directly, without the intermediary of professional announcers. It would also tend to eliminate "negative" advertising messages, because existing research indicates that the public dislikes negative ads (even though they work) and will vent its displeasure against any candidate appearing in his or her own negative ad.

Payment

Broadcast stations would be required to make this time available free of charge to all presidential candidates in exchange for their own continued free use of public frequencies and in lieu of a spectrum fee. (As additional options, broadcasters could be given a tax deduction for the fair market value of the time they are required to relinquish, or the costs of this time could be offset against the value of a newly imposed spectrum fee.) A free-time requirement would not violate broadcasters' First Amendment speech interests under current Supreme Court decisions.[1]

Campaign Financing

The basic existing system of campaign financing for presidential elections—expenditure ceilings, public matching funds, and contribution limits in the primary election, and expenditure ceilings, total public financing, and no private contributions in the general election—would remain in place. The provision of free broadcast time would allow candidates to spend public financing funds on other forms of campaign communications.

New Sources of Public Financing for Primary Campaigns

The current primary election contribution limits of $1,000 for individual contributions (with a cap of $25,000 in total contributions) and $5,000 for political action committee (PAC) contributions would also be retained. However, contributors wishing to make contributions *over the lower limits* in the primary election—e.g., to give up to $5,000 per candidate for individuals and up to $10,000 per candidate for PACs—would be allowed to do so only pursuant to an important condition: that 50 percent of the excess amount of their larger contributions over the lower limits would go into a special fund to be divided equally between both candidates to promote candidate dialogue and improved public information. Candidates could use this additional money to pay for direct mail contacts with voters as well as other informational primary election activities (such as candidate debates, paid political advertising and get-out-the-vote efforts). Because such contributions would be voluntary and deemed an exception to the normal lower contribution limits, they should pass constitutional muster.

Restrictions on Purchase of Other Broadcast Time

Candidate purchases of additional television and radio time would be prohibited. (As an alternative, purchases of broadcast time could be limited to no more than a total of one additional hour per station during the month before the election.)

Equal Time and Other Political Regulations

The equal opportunities doctrine (Section 315 of the Communications Act of 1934) would be suspended for the general election but remain in place for the primary election. The other provisions of Section 315 (e.g., lowest unit rate, no censorship) would also remain, as would the Communications Act's "reasonable access" provision (Section 312[a][7]). The Fairness Doctrine with its *Cullman* corollary (establishing that, in order to meet its

Fairness Doctrine obligation, a broadcaster must offer response time free of charge) would be applied to *paid* broadcasting time by presidential candidates during the primary election, with candidates receiving free time when they were unable to pay for at least one spot for every three of their opponent's.

Minority Party Candidates

Minority party candidates receiving between 5 and 20 percent of the vote in the prior election would receive general election media time and financial support in proportion to the vote they received in that election. Candidates receiving over 20 percent of the vote in the last election would be treated like majority party candidates.

Senatorial and Congressional Races

Broadcast Time

In exchange for senatorial and congressional candidates' voluntary acceptance of expenditure ceilings and public financing (see below), each national political party would receive a total of one hundred hours of additional free air time (for an average of two hours on every television and radio station and cable system per state) to use to promote senate and congressional candidacies in the general elections. The political parties would have the discretion to obtain this time in minimum lengths of two minutes and maximum lengths of one-half hour. The national parties could not, however, acquire less than one hour, or more than three hours, from any station per state. This proposal would guarantee all candidates in smaller states, or in states with non-competitive races, at least one hour of time in the aggregate to communicate with voters, but it would still allow the national parties to focus their resources (up to three hours) on the more competitive or important races.

A national party might decide, for example, that races in California and Wyoming were particularly important (or competitive) in a given year, but that races in New York and Alaska were less so. It might therefore give its California and Wyoming candidates a total of three hours of time per station and its New York and Alaska candidates only one hour per station. In addition, the parties could concentrate their time (up to three hours) in communities with more candidates or with important races. This proposal would prevent individual stations from being overwhelmed with requests for time, yet not require candidates to take time who did not need it.

Carriage

The national political parties would determine how to use the time allocated to them for each station. Time would be available to them only during the sixty days before the election. An average rate of two hours per station spread over sixty days would provide each party with an average of two minutes per station per day to allocate for all its senatorial and congressional candidates combined. Since congressional candidates, particularly those in larger urban areas with many districts such as Los Angeles, do not usually purchase television time, most of the time acquired in these urban areas would be devoted to senatorial races, party-wide messages (promoting all Republican or Democratic candidates, for example) or, in rare instances, individual but important and closely contested congressional races. Parties would have the flexibility to acquire, say, only one hour of time in rural areas with fewer candidates, and up to three hours in urban areas with numerous candidates.

Format

As with presidential elections (see above), candidates would have to appear personally in at least 80 percent of each program or spot.

Payment

Stations would be required to make this time available free of charge to all candidates. (Tax deductions or spectrum fee offsets could be considered.)

Campaign Financing

A system of public financing (either total or matching) and expenditure ceilings would be adopted for all senatorial and congressional primary and general election candidates. Improvements to the presidential system of campaign financing (e.g., limits on "soft money" as suggested above) would be applied to senatorial and congressional races as well. Because candidates would receive free media time, they would not need as much public financing, and the cost of congressional campaign finance reforms would be mitigated somewhat.

New Sources of Public Financing

Current contribution limits should be maintained, but contributors wishing to give more (see above) would have to agree that 50 percent of the excess amounts over the lower original limits would be divided equally among both candidates. These moneys could be used only for speech-related purposes in the primaries (debates, ads, direct mail, etc.).

Restrictions on Purchase of Other Broadcast Time.

Purchase of additional radio and television time in the general election would be limited, although not prohibited (because candidates should have some freedom, in cases of disagreement with their national parties, to acquire supplemental amounts of time). Candidates, for example, might be able to purchase no more than the total amount of time allocated by their national political parties to their state, or no more than a specified amount of time (e.g., one-half hour per election) in the primary or general elections.

Equal Time and Other Political Regulations

As described above, the equal opportunities portion of Section 315 would be repealed for time acquired through the national political parties but retained for time purchased individually by candidates. The Fairness Doctrine would be applied to paid political appearances, so that any candidate unable to purchase one spot for every three of his or her opponent's spots would receive compensatory free broadcast time.

State and Local Candidates

General Approach

Most states have adopted various campaign finance regulations, but they are preempted by federal law from providing candidates with access to broadcast time. States have thus been unable to create coordinated reform packages that include both campaign financing and media solutions. Congress should provide states with limited exemptions from the federal preemption on their regulation of broadcast time, allowing any state that adopts campaign finance reform packages within certain parameters (including adequate public financing and reasonable expenditure and contribution limits) to qualify their political parties to obtain limited amounts of free air time for candidates. (Interestingly, states might now be able to require cable television systems within their borders to provide candidates with free time over governmental access channels, although to date they have failed to explore this option.)

Broadcast Time

Each political party would receive up to two hours on each television or radio station in the state during the sixty-day period before the general election. The time would be available in minimum lengths of two minutes and maximum lengths of one-half hour. The state political parties could allocate this time among statewide, legislative, or even local candidates, according to the parties' electoral priorities. (Although many local candidates run in non-partisan elections, they are often informally aligned with specific parties; in any event, parties could support local candidates whose views most closely matched their own.)

Carriage

The parties and their candidates would select the desired time periods.

Format

Candidates would have to appear personally in at least 80 percent of each program or spot.

Payment

Broadcasters would be required to make this time available free. (Tax deductions for the fair market value of this time or spectrum fee offsets could be considered.)

New Sources of Public Financing

States with a basic contribution limit would be allowed to adopt a second, higher contribution limit and provide candidates with half of the difference between the higher contribution and the lower limit (see above). These funds could be used to purchase media including broadcast and direct mail.

Equal Time and Other Regulations

The equal opportunities provision of the equal time doctrine would be suspended for time acquired under these new provisions by the state political parties, but the Fairness Doctrine would be applied to all political "uses" of broadcast time. A candidate would therefore receive free spots if his or her opponent acquired more than three times the time that he or she acquired.

Ballot Initiative Campaigns

General Problems

Ballot initiatives are used in about half the states and in the District of Columbia, and their use is increasing.[8] Yet ballot initiatives confront a number of informational obstacles. First, the Supreme Court has ruled that limits cannot be placed on either contributions to, or expenditures by, ballot initiative committees. This has allowed large financial interests to swamp some initiative campaigns with one-sided spending (sometimes at a ratio of more than twenty to one).[9] Second, the Supreme Court has struck down limits on the use of paid signature gatherers, thus further aggregating the impact of financial disparities. Third, Congress has not required broadcast stations to sell ballot measure campaigns air time at the "lowest unit rate," although it has made this rate available to political candidates. Finally, the FCC has repealed the

Fairness Doctrine for ballot measures, thus leaving voters often exposed to one-sided barrages of paid commercials for or against proposed laws which, once approved, may not be amended for decades.

Ballot initiative campaigns are often funded in grossly disproportionate ways, with one side frequently receiving financial support from corporate, labor, or business interests and the other side forced to scramble for small individual contributions.[10] Moreover, ballot initiative committees must pay the highest rates for air time, and stations are not required to balance one-sided ad campaigns with free response time under the Fairness Doctrine.

Lowest Unit Rate

Congress should apply the lowest unit rate provision of Section 315 to ballot initiatives as well as candidates. There seems no apparent policy reason why ballot measure committees should be forced to spend many times more on political spots than candidates. Because ballot initiatives, once adopted, immediately become law and frequently cannot be amended even with a unanimous vote of the legislative body, the argument for reduced-rate media time to discuss the pros and cons of such measures seems even stronger than in candidate campaigns.

Fairness Doctrine

Congress or the FCC should reinstate the Fairness Doctrine for all ballot measure campaigns. In the 1988 general election in California, for example, when the FCC still applied the Fairness Doctrine to ballot measures, insurance companies spent over $80 million to promote a series of ballot initiatives in their favor. A competing measure (Proposition 103) was qualified by a coalition of public interest organizations. Without the Fairness Doctrine, Proposition 103 would have been deprived of any semblance of informational balance in the campaign; with it, voters were exposed to all views. As a result, they rejected the four insurance industry-sponsored measures (some by close votes) and chose the public measure instead.

SOME CONCLUDING POINTS

The need for an informed electorate applies to all levels of politics—federal, state, and local, and to both candidates and ballot measures. Suggested reforms must be applicable to all campaigns at these levels.

Although these proposed reforms place a financial and programming obligation on the broadcast media to provide free time, those burdens are comparatively small. If the proposed reforms are adopted for campaigns for president, senate, congress, and state and local offices, an individual broadcast station will be obliged to provide an average of up to fourteen hours of free time to candidates of both parties once every four years during presidential elections and another nine hours during the off-year congressional and state elections.[11] This amounts to a total of twenty-three hours of time over a four year period—under six hours a year, or 0.0008 of the average broadcaster's time.[12]

In a presidential election year, assuming that the fourteen hours of time is allocated during the sixty days before the general election, each station would be required to make available an average of about fourteen minutes of time per day for all candidates and ballot measures. In an off year, it would make available about nine minutes a day.

Stations pay the government relatively little for the right to operate on scarce public spectrum space. By comparison, anyone cutting timber or drilling for oil on publicly owned lands pays a significant fee based on the value of that right. To preserve and enhance electoral democracy in this country, and to compensate the public for broadcaster use of valuable spectrum, broadcasters should be asked to do no less.

Endnotes

1. For a good overview of the Fairness Doctrine, what it required, and why it was repealed, see Anthony Corrado's paper, "The Public Interest and Digital Broadcasting Options for Political Programming," in this volume.

2. If a candidate of a party (e.g., Republican Party) gets over 20% of the vote in the last Presidential election, than a candidate for that party is deemed a major party candidate in the next election.

3 Applying this rule to television *networks* rather than individual *stations* would not suffice, because the programming would not reach many independent stations in the United States. Applying the rule to cable television networks rather than individual cable systems, however, should suffice, since few cable systems provide independent programming.

4 In *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), for example, the Supreme Court held that broadcasters can be compelled to share a portion of their channel space with other users if that sharing serves a broader "public interest." See *CBS v. FCC*, 453 U.S. 367 (1981). *Miami Herald v. Tornillo*, 418 U.S. 241 (1974), applied to newspapers and rested substantially upon the "chilling effect" of a rebuttal requirement, which is absent under this proposal. Conceptually, the broadcaster would be viewed as having been licensed to control the entire broadcast day except for a few hours every four years which would be withheld for public use. (See my *Government-Created Scarcity: Thinking About Broadcast Regulation and the First Amendment*, in this volume.)

5 In addition, a number of improvements should be considered. These improvements should include raising the expenditure ceilings by 25 percent; lowering postal rates for candidates; eliminating "soft money" loopholes; eliminating "bundling" by PACs and other organizations; imposing aggregate contribution limits on all PAC contributions (e.g., PAC contributions could account for no more than 20 percent of candidates' total contributions); limiting spending by wealthy candidates; and restraining independent spending by corporate and labor PACs. The last two measures would require a modification of the Supreme Court's overly restrictive doctrines in *Buckley v. Valeo*, 424 U.S. 1 (1976).

6 Thus, an individual contributor could give a presidential primary candidate a normal contribution of up to $1,000, all of which would go directly to the candidate. If the contributor chose to exercise his or her option to give a candidate a special contribution of, say, $5,000, the money would be apportioned as follows: The first $1,000 would go directly to the candidate, as before. Of the remaining $4,000, 50 percent ($2,000) would also go to the candidate; the other 50 percent would be placed in a fund to be divided equally between the candidates to finance their contest ($1,000 each). In effect, therefore, a $5,000 individual contribution would net the direct recipient $4,000 and his or her opponent $1,000.

7 Contributors not wishing to give any of their money to opposing candidates would have to keep their contributions under the standard $1,000 limit. Contributors wishing to give their candidates more money under the special higher contribution limit would be deemed voluntarily to have consented to have a portion of their contribution dedicated to a "debate fund" to make possible a dialogue between the candidates.

8 Between 1900 and 1980, the average number of initiatives reaching the ballot in all the states remained roughly constant. In the 1980s, this number jumped 400 percent. In many states, with California still in the lead, major state environmental, fiscal, and governmental policies are increasingly resolved at the ballot box and not in state legislatures. The growth of the Internet can be expected to accelerate this trend, allowing voters to circulate, qualify, debate, and ultimately vote upon these measures from their homes or offices via computers and modems.

9 In California's twenty highest spending recent ballot initiative campaigns, two-thirds of all the money raised came in contributions of $100,000 or more, and one-third of all the money raised came in contributions of $1 million or more.

10 During the 1988 California Proposition 99 campaign for increased cigarette taxes, for example, the cigarette industry contributed $18 million for the "No" side, while anti-smoking forces raised less than $2 million for the "Yes" side.

11 This twenty-three hour total includes fourteen hours every four years plus an additional nine hours during off-year elections: a total of five hours of time for two presidential candidates; a total average of four hours for senatorial and congressional candidates (two hours for each national party); four hours for state and local candidates (two hours for each state party); and perhaps up to one hour for ballot measure rebuttals under the Fairness Doctrine. In addition, the national and state political parties would receive up to eight hours for off-year elections and, presumably, stations in some states might also incur one additional hour of Fairness Doctrine rebuttal time for off-year ballot measure campaigns.

12 This assumes the average broadcast station is on the air 20 hours a day, 365 days a year.

APPENDIX

The Aspen Institute

Working Group on Digital Broadcasting and the Public Interest

Toward a New Approach to Public Interest Regulation of Digital Broadcasting

January 25–27, 1998
Wye River Conference Center
Queenstown, Maryland

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Working Group on Digital Broadcasting and the Public Interest

Enhancing Political Discourse

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Working Group on Digital Broadcasting and the Public Interest

Implementing the Public Interest Standard

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Note: Titles and affiliations are as of the date of the conference.

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About the Authors

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Forrest P. Chisman is president of the Southport Institute for Policy Analysis. Mr. Chisman has worked in and around communications policy for much of his career. His experience includes positions at the National Telecommunications and Information Administration, where he served as Director of the Office of Planning and Policy Coordination and Deputy Associate Administrator for Policy Analysis and Development, as well as nonprofit-sector positions at The Aspen Institute and The John and Mary R. Markle Foundation. More recently, Mr. Chisman's work has focused on education, employment, and social welfare policies. He holds degrees from Harvard and Oxford Universities.

Robert Corn-Revere is a partner in the Washington, D.C. office of Hogan & Hartson, L.L.P., specializing in First Amendment and communications law. He has written extensively on First Amendment issues. Mr. Corn-Revere also serves as chairman of the Media Institute's First Amendment Advisory Council and is an adjunct scholar to the Cato Institute in Washington, D.C. Before joining Hogan & Hartson, Mr. Corn-Revere was Legal Advisor to FCC Commissioner James Quello, and was named Chief Counsel during Mr. Quello's tenure as chairman of the Commission. A former journalist, he holds degrees from Eastern Illinois University and the University of Massachusetts-Amherst, and received his J.D. from the Columbus School of Law at Catholic University.

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Andrew L. Shapiro is the newly-appointed director of the The Aspen Institute Internet Policy Project and a fellow at the Brennan Center for Justice at New York University. He is also a fellow at Harvard Law School's Center for Internet and Society. A contributing editor at *The Nation*, he writes regularly about law, politics, and technology for *The Nation* and for other publications. Mr. Shapiro is the author of a forthcoming book on the politics of the new media, to be published by the Twentieth Century Fund. Mr. Shapiro graduated Phi Beta Kappa from Brown University. He received a law degree from Yale Law School where he was editor-in-chief of the *Yale Journal of Law and the Humanities*, and afterwards served as a law clerk to Judge Pierre N. Leval of the U.S. Court of Appeals for the Second Circuit.

Tracy Westen is president of the Center for Governmental Studies in Los Angeles, a nonprofit organization that researches and proposes ways to improve the processes of state and local government. He is also the executive director of the California Commission on Campaign Finance. As founder of The California Channel, a statewide cable network providing gavel-to-gavel legislative coverage, and president of The Democracy Network, a new system of free political communication on the Internet, Mr. Westen has been instrumental in the development of new media to serve the information needs of citizens and voters. Westen teaches communications law and policy at the Annenberg School for Communication at the University of Southern California and at the UCLA Law School. He is the author of ten books on campaign financing, ballot initiatives, and media reform, including *The New Gold Rush: Financing California's Legislative Campaigns* and *Democracy by Initiative*.

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About the Communications and Society Program

The overall goal of the Communications and Society Program is to promote thoughtful, values-based decision making in the fields of communications, media, and information policy. In particular, the Program focuses on the implications of communications and information technologies on democratic institutions, individual behavior, instruments of commerce, and community life.

The Communications and Society Program accomplishes this goal through two main types of activities. First, it brings together leaders of industry, government, the nonprofit sector, media organizations, the academic world, and others for roundtable meetings to assess the impact of modern communications and information systems on the ideas and practices of a democratic society. Second, the Program promotes research and distributes conference reports to decision makers in the communications and information fields, both within the United States and internationally, and to the public at large.

Topics addressed by the Program vary as issues and the policy environment evolve, but each project seeks to achieve a better understanding of the societal impact of the communications and information infrastructures, to foster a more informed and participatory environment for communications policymaking, or to promote the use of communications for global understanding. In recent years, the Communications and Society Program has chosen to focus with special interest on the issues of electronic democracy, lifelong learning and technology, electronic commerce, the future of advertising, Internet policy, and the role of the media in democratic society.

Additional information about the Communications and Society Program and other activities of The Aspen Institute is available on the World Wide Web, at www.aspeninst.org.

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